Minority Dissenting Views to Articles of Impeachment

For only the second time in the history of our Nation, the House is poised to impeach a sitting President. The Judiciary Committee Democrats uniformly and resoundingly dissent.

We believe that the President's conduct was wrongful in attempting to conceal an extramarital relationship. But we do not believe that the allegations that the President violated criminal laws in attempting to conceal that relationship – even if proven true – amount to the abuse of official power which is an historically rooted prerequisite for impeaching a President. Nor do we believe that the Majority has come anywhere close to establishing the impeachable misconduct alleged by the required clear and convincing evidence.

Historian Arthur Schlesinger, appearing before the Committee on November 9, 1998, explained the grave dangers of "dumbing-down" the impeachment process for largely private misconduct:

> Lowering the bar to impeachment creates a novel, indeed revolutionary theory of impeachment, a theory that would send us on an adventure with ominous implications for the separation of owers that the Constitution established as the basis of our political order.[1]

Impeachment is like a wall around the fort of the separation of powers fundamental to our constitution; the crack we put in the wall today becomes the fissure tomorrow, which ultimately destroys the wall entirely. This process is that serious. It is so serious the wall was not even approached when President Lincoln suspended the *writ of habeas corpus*, nor when President Roosevelt misled the public in the lend-lease program, nor when there was evidence that Presidents Reagan and Bush gave misleading evidence in the Iran-contra affair.

We also note at the outset our profound disagreement with the process that the Judiciary Committee undertook to report this resolution. Without any independent examination of fact witnesses, this Committee essentially rubber-stamped a September 9th Referral from the Office of Independent Counsel (OIC). That Referral contained largely unproven allegations based on grand jury testimony -- often inadmissable hearsay evidence -- which was never subject to cross examination. Indeed the Committee's investigation of this material amounted to nothing more than simply releasing to the public the Referral and tens of thousands of accompanying pages of confidential grand jury material. In this regard, we decry the partisanship that accompanied this sad three month process at nearly every turn, and point out its unfortunate departure from the experience of Watergate in 1974.

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[1] *The Background and History of Impeachment: Hearings on H. Res. 581 Before the Subcomm. On the Constitution, 105th Cong., 2d Sess.* (1998) (Nov. 9, 1998) ("Subcommittee Hearing"), at 96-7.

There is no question that the President's actions were wrong, and that he has suffered profound and untold humiliation and pain for his actions. But it is also undeniable that, when asked squarely about his relationship with Ms. Lewinsky before the grand jury, the President directly admitted to the improper physical relationship. The core of the charges against the President, thus, is that he did not adequately describe the intimate details of the relationship, and that his attempts to conceal his relationship amounted to a criminal conspiracy. Our review of the evidence, however, convinces us of one central fact - - there is no persuasive support for the suggestion that the President perjured himself in his civil deposition or before the grand jury in any manner nearing an impeachable offense, obstructed justice, or abused the powers of his office. A few examples will make the point.

The President's statements under oath in the dismissed *Jones* case were in all likelihood immaterial to that case and would never have formed the legal basis for any investigation. The alleged perjury before the grand jury also involves petty factual disputes which have no standing as impeachment counts. The Majority further alleges that the President attempted to find Ms. Lewinsky a job in order to buy her silence. But the evidence makes clear that efforts to help Ms. Lewinsky find a job began in April 1996, long before she ever was identified as a witness in the *Jones* case. Ms. Lewinsky herself testified that "no one ever asked me to lie and I was never promised a job for my silence."[2] Likewise, while the Majority contends that the President tried to hide gifts he had given Ms. Lewinsky, the evidence makes clear that Ms. Lewinsky – and not the President -- initiated the transfer of those items to the President's secretary, Ms. Currie. Finally, while the Committee wisely rejected the abuse of power allegations brought by the OIC, it then improvidently substituted a spurious new charge of abuse largely because they did not like the President's tone in responding to the 81 questions posed by Chairman Hyde.

In this context, we also point out, that since the election of President Clinton in 1992, Congressional Republicans and the OIC have spent tens of millions of dollars of taxpayers' monies on investigations of the President -- investigations which have been discredited in the eyes of the public. In the process, Congressional Republicans have perverted the powers of Congressional investigation into a political weapon, setting a dangerous precedent for future generations.

Finally, we note that there is virtual unanimity among Democrats and Republicans that the Senate will not convict President Clinton, and, thus, that the House is merely using the extraordinary powers of impeachment to express its displeasure for presidential actions. We regard this use of the impeachment sword as a perversion of our Constitutional form of government and as a dangerous arrogation of power by the Majority.

The following sets forth an outline of our dissenting views:

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[2] H.R. Doc. No. 311, *infra*, at 1393 (reprinting Lewinsky 7/27/98 OIC 302 at 5).

I.
THE CONSTITUTIONAL STANDARD FOR IMPEACHMENT HAS NOT BEEN SATISFIED

Impeachment is only warranted for conduct that constitutes "Treason, Bribery, or other high Crimes and Misdemeanors" as set forth in Article II, Section 4 of the Constitution. As virtually all constitutional scholars have noted, there is an important distinction between criminal and impeachable offenses -- impeachment serves to protect the nation, *not* to punish the wrongdoer. A review of the language of the Constitution, the history and drafting of the impeachment clause, and subsequent review of its usage all serve to confirm that in all but the most extreme instances, the remedy of impeachment should be reserved for egregious abuses of presidential authority, rather than misconduct unrelated to public office. It is also clear that the President is subject to civil and criminal punishment independently of the impeachment process. The constitutional process of impeachment should not, therefore, be used for punitive purposes.

Members of the Majority have gone to great lengths to misconstrue the power of impeachment as one that is appropriately exercised against a chief executive based on any potentially criminal conduct. This interpretation is flatly inconsistent with the intentions of the Framers and the prior presidential impeachments in this country. It also is contrary to the central conclusions of the Staff Report produced by the Watergate impeachment inquiry staff in 1974.[3]

Although many have inaptly compared the present proceedings to the genuine constitutional crisis brought about by President Richard Nixon, there are far more dissimilarities than parallels. In using the powers granted by the Independent Counsel Act[4] for the first time to justify the submission of a report to Congress outlining possible impeachable offenses, the OIC departed from the traditional deference shown by past presidential prosecutors. As these other prosecutors have recognized, it is Congress constitutional responsibility to determine whether alleged misconduct by a chief executive constitutes grounds for impeachment. Watergate independent prosecutor Leon Jaworski submitted grand jury materials to Congress that consisted only of grand jury transcripts and a “road map” through the allegations being investigated by the

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[3] Staff of the House Comm. on the Judiciary, 93d Cong., 2d Sess (Comm. Print 1974), *Constitutional Grounds for Presidential Impeachment*) (hereinafter, "*Watergate Staff Report*"). At the November 9, 1998, Constitution Subcommittee Hearing on the Background and History of Impeachment , Mr. Scott asked the panel whether they agreed that every felony falls within the definition of "Treason, Bribery or other high Crimes and Misdemeanors." The record shows that not one of the 10 panelists agreed that every felony is an impeachable offense.

[4] Ethics in Government Act, 28 U.S.C. §§ 591-99.

grand jury. His report "provided no analysis and drew no conclusions."[5] To this day, that document remains sealed.[6] Congress, in short, recognized that only it had the right and the responsibility to level public charges of impeachable offenses against the President.

The Committee's constitutional responsibility is quite distinct from cataloging laws that may have been violated. The determination of whether to impeach a President is vastly different than the determination of whether there is evidence of a legal offense. The Majority, by invoking the language of criminal statutes to describe the President's alleged misconduct, directly contradicts one of the main conclusions of the Watergate Staff Report, which it purports to endorse:

> The impeachment of a President must occur only for reasons at least as pressing as those needs of government which give rise to the creation of criminal offenses. But this does not mean that the various elements of proof, defenses, and other substantive concepts surrounding an indictable offense control the impeachment process. Nor does it mean that state or federal criminal codes are necessarily the place to turn to provide a standard under the United States Constitution. Impeachment is a constitutional remedy. The Framers intended that the impeachment language they employed should reflect the grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify impeachment.[7]

The assumption that a president's violation of any of a number of laws may trigger the impeachment provisions of Article II, Section 4 of the Constitution is fundamentally misguided. In fact, as virtually all constitutional experts recognize, not all impeachable offenses are crimes and not all crimes are impeachable offenses. Again, the 1974 Watergate Staff Report is instructive on this issue:

> Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process -- removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government . . . The general applicability of the criminal law also makes it inappropriate as the standard for a process applicable to a highly specific situation such as removal of a President. . . . In an impeachment proceeding a President is called to account for abusing powers that only a President possesses.[8]

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[5] Linda Greenhouse, *Testing of a President*, New York Times, Sept. 12, 1998, at 1A.

[6] Kevin Johnson and Judy Keen, *The Case Against the President*, USA Today, Sept. 14, 1998, at 1E.

[7] *Watergate Staff Report* at 22.

[8] *Watergate Staff Report* at 24.

A. A President May Only Be Impeached for "Treason, Bribery or Other High Crimes and Misdemeanors"

With regard to the actual text of the Constitution, the juxtaposition of such serious offenses of Treason and Bribery with the phrase "other high Crimes and Misdemeanors" serves as an important indicator of how the latter term should be defined. In other words, such "other high Crimes and Misdemeanors" must constitute abuses of public office – similar to treason and bribery -- to become impeachable conduct.[9]

It also bears emphasis that the word "high" modifies both "Crimes" and "Misdemeanors." As the history of the latter term makes clear, the Framers did not entrust Congress with the power to impeach a popularly elected President simply upon a showing that the executive committed a "misdemeanor" crime as we now understand the term -- a minor offense usually punishable by a fine or brief period of incarceration. Instead, an examination of the relevant historical precedents indicates that a president may only be impeached for conduct that constitutes an egregious abuse or subversion of the powers of the executive office.[10]

It is evident from the legislative history surrounding the constitutional convention that the Framers intended impeachment to be a very limited constitutional remedy. At the outset, delegates such as Governor Morris and James Madison objected to the use of broad impeachment language. Morris argued that "corruption & some few other offences to be such as ought to be impeachable; but thought the cases ought to be enumerated & defined,"[11] and Madison noted that impeachment was only necessary to be used to "*defend[] the Community* against the incapacity, negligence or perfidy of the chief Magistrate."[12]

The critical drafting occurred on September 8, 1787. George Mason objected to the fact that the draft was too limited because it applied only to "treason or bribery" and sought to add the term "maladministration." When Madison objected that "so vague a term will be equivalent to a tenure during pleasure of the Senate," Mason withdrew "maladministration" and substituted "high

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[9] This reading is an example of the standard rule of construction known in Latin as "*ejusdem generis*," or "of the same kind," providing that when a general word occurs after a number of specific words, the meaning of the general word is limited to the kind or class of things in which the specific words fall.

[10] The 1974 Watergate Staff Report at 12 wrote, "Blackstone's *Commentaries on the Laws of England* – a work cited by delegates in other portions of the Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as 'a book which is in every man's hand' – included 'high misdemeanors' as one term for positive offenses 'against the king and government.'... 'High Crimes and Misdemeanors' has traditionally been considered a 'term of art,' like such other constitutional phrases as 'levying war' and 'due process.'"

[11] Raoul Berger, Impeachment: The Constitutional Problems, 65 (1973).

[12] *Id.* (emphasis added).

crimes and misdemeanors agst. the State," which was accepted by the delegates. [13] The narrowness of the phrase "other high Crimes and Misdemeanors" was confirmed by the addition of the language "against the State," reflecting the Convention's view that only offenses against the political order should provide a basis for impeachment. Although the phrase "against the United States" was eventually deleted by the Committee of Style that produced the final Constitution,[14] the Committee of Style was directed not to change the meaning of any provision.[15] It is therefore clear that the phrase was dropped as a redundancy and its deletion was not intended to have any substantive impact.[16]

The construction that "other high Crimes and Misdemeanors" should be limited to serious abuses of official power is further confirmed by the commentary of prominent Framers and early constitutional commentators. Alexander Hamilton wrote in Federalist No. 65 that impeachable offenses "proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust." He stressed that those offenses "may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[17] Hamilton's view was endorsed a generation later by Justice Joseph Story in his *Commentaries on the Constitution* when he wrote, " [impeachable offenses] are committed by public men in violation of their public trust and duties. . . . Strictly speaking, then, the impeachment power partakes of a political character, as it respects injuries to the society in its political character."[18] Justice Story added that impeachable offenses "peculiarly injure the commonwealth by the abuse of high offices of trust."[19]

Prior impeachment precedents also demonstrate that, for offenses to be impeachable, they must arise out of a president's public, not private, conduct. In 1868, Andrew Johnson was impeached by the House Republicans because he had removed the Secretary of War, Edwin M. Stanton, who had disagreed with his post-Civil War reconstruction policies.[20] Although the impeachment of President Andrew Johnson failed in the Senate, it bears note that all of the

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[13] *Watergate Staff Report* at 11-12.

[14] 2 Max Farrand, The Records of the Federal Convention of 1781, 551 (Rev. Ed. 1967).

[15] *Id.* at 553.

[16] *See* Fenton, *The Scope of the Impeachment Power*, 65 N. W. L. Rev. 719, 740 (1970).

[17] Alexander Hamilton, The Federalist Papers, 65 (C. Rossiter, ed., 1991).

[18] 2 Joseph Story, Commentaries on the Constitution § 744 (1st ed. 1833) .

[19] *Id.*

[20] Stanton's removal was said to be inconsistent with the Tenure in Office Act, requiring Senate approval for removal of certain officers.

impeachment articles related to alleged public misconduct.[21]

The circumstances surrounding the proposed impeachment of President Nixon also support the view that impeachment should be limited to threats that undermine the Constitution, not ordinary criminal misbehavior unrelated to a president's official duties. All three of the articles of impeachment approved by the House Judiciary Committee involved misuse of the President's official duties.[22] Even more telling are the circumstances by which the Committee rejected articles of impeachment relating to allegations of income tax evasion. When the Judiciary Committee debated a proposed article of impeachment alleging that President Nixon had committed tax fraud when filing his federal income tax returns for the years 1969 through 1972 filed under penalty of perjury[23] it was defeated by a vote of 26-12. Although some Members believed this count was not supported by the evidence, the primary ground for rejection was that the Article related to the President's private conduct, not to an abuse of his authority as President.[24]

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[21] The eleven articles of impeachment related to Johnson's removal of Stanton, the impact of that removal on congressional prerogatives and its impact on post-civil war reconstruction. *See Cong. Globe Supp.*, 40th Cong. 2d Sess. V. II, at 139-40 (April 23, 1868) and 286-89 (April 29, 1868). *See also Cong. Globe Supp*., 40th Cong. 2d. Sess., at 286-310 (1868).

[22] The First Article -- alleging that President Nixon coordinated a cover-up of the Watergate break-in by interfering with numerous government investigations, using the CIA to aid the cover-up, approving the payment of money and offering clemency to obtain false testimony -- qualified as a high Crime and Misdemeanor, because "[the President used] *the powers of his high office* [to] engage . . . in a course of conduct or plan designed to delay, impede, and obstruct [the Watergate investigation]." The Second Article -- alleging that the President used the IRS as a means of political intimidation and directed illegal wiretapping and other secret surveillance for political purposes -- described "a *repeated and continuing abuse of the powers of the Presidency* in disregard of the fundamental principle of the rule of law in our system of government." The Third Article – alleging that President Nixon refused to comply with subpoenas issued by the Judiciary Committee in its impeachment inquiry -- was considered impeachable because such subpoena power was essential to "Congress' [ability] to act as the ultimate safeguard against improper presidential conduct."

[23] The crux of the impeachment article related to allegations that the President understated his income and overstated his deductions for the years 1969 through 1972.

[24] Republican congressmen explicitly emphasized that personal misconduct could not give rise to an impeachable offense. Congressman Tom Railsback (R-IL) noted that there was "a serious question as to whether something involving [the President's] personal tax liability has anything to do with his conduct of the office of the President." Congressman Lawrence J. Hogan (R-MD), quoted from the impeachment inquiry staff report:

> As a technical term, high crime signified a crime against the system of government, not merely a serious crime. *This element of injury to the commonwealth, that is, to the state itself and to the Constitution, was historically the criteria for distinguishing a high crime or misdemeanor from an ordinary one.*

Similarly, Democratic Congressman Jerome Waldie (D-CA) echoed the Republican distinction between public and private conduct, and opposed the proposed article because "the impeachment process is a process

A review of the writings by prominent scholars concerning the issue of impeachment further confirms the general principal that for presidential wrongdoing to rise to the level of an impeachable offense it must relate to grievous abuse of office. The question of whether private presidential misconduct could be impeachable was posed twenty-five years ago by Professor Charles Black, in his seminal work, *Impeachment: A Handbook*, when he posited the following hypothetical:

> Suppose a President transported a woman across a state line or even (as the Mann Act reads) from one point to another within the District of Columbia, for what is quaintly called an "immoral purpose." . . . Or suppose the president actively assisted a young White House intern in concealing the latter's possession of three ounces of marijuana – thus himself becoming guilty of "obstruction of justice." Would it not be preposterous to think that any of this is what the Framers meant when they referred to "Treason, Bribery, or other high Crimes and Misdemeanors," or that any sensible constitutional plan would make a president removable on such grounds?[25]

More recently, a large group of legal scholars and academics have offered their views regarding the impeachability of the misconduct alleged by the Majority. On November 6, 1998, 430 Constitutional law professors wrote: "Did President Clinton commit 'high Crimes and Misdemeanors' warranting impeachment under the Constitution? We ... believe that the misconduct alleged in the report of the Independent Counsel ... does not cross that threshold .... [I]t is clear that Members of Congress would violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment."[26]

One week earlier, more than four hundred historians issued a joint statement warning that because impeachment has traditionally been reserved for high crimes and misdemeanors in the exercise of executive power, impeachment of President Clinton based on the facts alleged in the OIC Referral would set a dangerous precedent. "If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future."[27]

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designed to redefine Presidential powers in cases where there has been enormous abuse of those powers and then to limit the powers as a concluding result of the impeachment process."

[25] Charles L. Black, Impeachment: A Handbook 35-36 (1974).

[26] Letter from more than 400 Constitutional law professors (Nov. 6, 1998) (submitted as part of the Constitution Subcommittee Hearing Record).

[27] *Statement Against the Impeachment Inquiry,* submitted to the Committee by more than 400 historians (Oct. 28, 1998)(submitted as part of the Constitution Subcommittee Hearing Record).

The weight of evidence offered at Committee hearings also supports the view that in all but the most extreme instances, impeachment should be limited to abuse of public office, not private misconduct. This point was made by several of the witnesses at the Constitution Subcommittee Hearing on the Background and History of Impeachment. Chicago Law Professor Cass Sunstein, summarized the standard as follows: "[w]ith respect to the President, the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of authority that come from the exercise of *distinctly presidential powers*. Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution."[28] Professor Sunstein went on to review English Parliamentary precedent, the intent of the Framers and subsequent impeachment practice as all supporting this bedrock principle. In his view, the only exception where purely private conduct would be implicated was in the case of a heinous crime, such as murder or rape:

> [B]oth the original understanding and historical practice converge on a simple principle. The basic point of the impeachment provision is to allow the House of Representatives to impeach the President of the United States for *egregious misconduct that amounts to the abusive misuse of the authority of his office*. This principle does not exclude the possibility that a president would be impeachable for an extremely heinous "private" crime, such as murder or rape. But it suggests that outside such extraordinary (and unprecedented and most unlikely) cases, impeachment is unacceptable.[29]

Father Drinan, a former House Judiciary Committee Member who participated in the Watergate impeachment process, and now a Professor of Law at Georgetown University, reached the same conclusion, testifying that, "the impeachment of a president must relate to some reprehensible exercise of *official* authority. If a president commits treason he has abused his executive powers. Likewise a president who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a president's engaging in 'other high crimes and misdemeanors."[30] Eminent historian Arthur Schlesinger similarly distinguished between private and public misconduct:

> The question we confront ... is whether it is a good idea to lower the bar to impeachment. The charges levied against the President by the Independent Counsel plainly do not rise to the level of treason and bribery. They do not apply to acts committed by a President in his role of public official. They arise from instances of private misbehavior. All the Independent Counsel's charges ... derive entirely from a President's lies about his own sex life. His attempts to hide

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[28] *Subcommittee Hearing*, (Written Testimony of Cass Professor Sunstein at 2) (emphasis in original).

[29] *Id.* at 5,7, 8, 11, 12 (emphasis in original).

[30] *Id.* (Written Testimony of Robert F. Drinan, S.J. at 3-7).

> personal misbehavior are certainly disgraceful; but if they are to be deemed impeachable, then we reject the standards laid down by the Framers in the Constitution and trivialize the process of impeachment.[31]

Prominent witnesses called by the White House concurred in these assessments. Former Attorney General Nicholas Katzenbach testified that impeachment must involve "some conduct – some acts – which are so serious as to bring into question the capacity of the person involved to carry out his role with the confidence of the public" and noted that it was clear that "despite the strongly held views of some, the public does not put perjury about sexual relations in the category of 'high crimes or misdemeanors.'"[32] Princeton History Professor Sean Wilentz warned the Committee about the dangers of a largely partisan impeachment, and warned that "these proceedings are on the brink of becoming irretrievably politicized, more so even than the notorious drive to remove Andrew Johnson from office one hundred and thirty years ago."[33]

The one witness jointly selected by the Majority and the Minority – William & Mary Law Professor Michael Gearhardt – also testified that impeachment should principally be limited to abuse of public office:

> [There is a] widespread recognition that there is a paradigmatic case for impeachment consisting of the abuse of power. *In the paradigmatic case, there must be a nexus between the misconduct of an impeachable official and the latter's official duties*. It is this paradigm that Hamilton captured so dramatically in his suggestion that impeachable offenses derive from "the abuse or violation of some public trust" and are "of a nature which may be peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. This paradigm is also implicit in the founders' many references to abuses or power as constituting political crimes or impeachable offenses.[34]

Even some witnesses called by the Majority cautioned that discretion should be applied before applying the impeachment power in all situations. For example, Duke Law Professor William Van Alstyne stated that the allegations by Mr. Starr constituted "low crimes and misdemeanors" and that "[t]he further impeachment pursuit of Mr. Clinton may well not now be particularly worthwhile."[35] Charles E. Wiggins, a senior judge on the Ninth Circuit, and a former

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[31] *Id.* (Written Statement of Arthur Schlesinger, Jr. at 2).

[32] *Hearing before the House Comm. on the Judiciary*, Dec. 8, 1998 (Statement of Nicholas Katzenbach at 3-4).

[33] *Id.* (Written Testimony of Professor Sean Wilentz, at 5).

[34] *Id* . (Written Testimony of Professor Michael Gearhardt at 13-14) (footnotes omitted) (emphasis added).

[35] *Id.* (Written Testimony of Professor William Van Alstyne at 6).

Republican Member of the Judiciary Committee who participated in the Watergate inquiry stated, "I am presently of the opinion that the misconduct admittedly occurring by the President is not of the gravity to remove him from office."[36]

B. The Appropriate Role of The House In The Impeachment Process

It has been repeatedly argued that the House is like a grand jury that simply votes out an article of impeachment based on "probable cause" to believe that impeachable offense have occurred and lets the Senate weigh the actual evidence. This view of the House's role has been offered in support of the proposition that the House does not have to hear evidence or make decisions about who is telling the truth because that is the Senate's job. This cramped view of the appropriate role of the House finds no support in the Constitution and is completely contrary to the great weight of historical precedent. As former Watergate Era Attorney General Elliot Richardson warned:

> A vote to impeach is a vote to remove. If members. . . believe that should be the outcome, they should vote to impeach. If they think that is an excessive sentence, they should not vote to impeach, because if they do . . . the matter is out of your hands . . .[37]

During the debate over the articles of impeachment, Rep. Frank reminded the Members that they should not take the House's independent role to remove the president from office lightly: "I have to say that I think it is a grave error constitutionally to denigrate what we are doing. Yes, it is true that, as a consequence of this, the President will not be instantly thrown out of office. It is also true that the only justification and basis for this proceeding and the only basis on which Members can honestly vote for these articles is the conviction that the President ought to be thrown out of office."[38]

The argument that the House is merely the body that accuses and the Senate is the body that tries, undermines the dual protection against misuse of the impeachment power that the founders intended. The Constitution requires more than that the House be a mere rubber stamp for sending allegations of wrongdoing to the Senate; rather Article II intends that the House as well as the Senate look to the same evidence with the same standards. As constitutional expert Professor John H. Labovitz concluded with respect to Watergate, in terms that seem as if they were written for today;

> . . . there were undesirable consequences if the House voted impeachment on the

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[36] *Hearings before the House Comm. on the Judiciary*, "The Consequences of Perjury and Related Crimes," Dec. 1, 1998 (Written Testimony of Hon. Charles E. Wiggins).

[37] *Id*. (Written Testimony of Elliott Richardson).

[38] Markup Tr. 12/11/98, at 464.

> basis of one-sided or incomplete information or insufficiently persuasive evidence. Subjecting the Senate, the President, and the nation to the uncertainty and potential divisiveness of a presidential impeachment trial is not a step to be lightly undertaken. While the formal consequences of an ill-advised impeachment would merely be acquittal after trial, the political ramifications could me much more severe. Accordingly, the house . . . should not vote impeachments that are unlikely to succeed in the senate . . . the standard of proof applied in the House should reflect the standards of proof in the Senate . . .[39]

Professor Labovitz has meticulously documented how, in the Nixon inquiry, everyone agreed -- the Majority, the Minority, and the President's counsel -- that the standard of proof for the Committee and the House was "clear and convincing evidence." When the articles of impeachment are weighed against this standard, it is clear that the constitutional standard has not been satisfied.

II.
THE MISCONDUCT ALLEGED IN THE ARTICLES WOULD NEVER BE CHARGED AS A CRIMINAL VIOLATION

As discussed above, violations of criminal law are not sufficient to establish an impeachable offense. Much of the misconduct alleged in the articles of impeachment could not be the subject of a successful perjury prosecution and experienced prosecutors have persuasively testified that the misconduct alleged in the articles would never be the subject of a criminal prosecution.

A. The Alleged Perjurious Statements Were Immaterial

Both the Majority's allegation that the President committed perjury during his grand jury testimony (Article I) and during his testimony in the *Jones* case (Article II), are predicated on the President's efforts to conceal the nature and extent of his relationship with Ms. Lewinsky. Since so much time of the Committee was taken up with an examination of whether the President's conduct violated criminal law (rather than on whether that conduct amounted to impeachable offenses), some of the relevant issues of law have to be defined. In considering whether such conduct constituted a violation of law, the Committee should have focused on the effect, if any, that this testimony had on the course of that litigation.[40] Accordingly, since the first two Articles

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[39] Labovitz, *Presidential Impeachments*, at 192-3.

[40] A lie under oath becomes a criminal offense only when it is "material" to the proceeding in which it is given. Courts have held a statement to be material if it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination. Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects." *United States v. Barrett*, 111 F.3d 947, 953 (D.C. Cir. 1997) (internal quotation omitted) (brackets in original); *see also United States v. Moore*, 613 F.2d 1029, 1037-38 (D.C. Cir. 1979) (same); *United States v. Icardi*, 140 F. Supp. 383,

are largely based on the presumed seriousness of the President's failure to admit the full extent of his inappropriate relationship during his testimony, the relevance of the testimony must be considered.

Paula Jones was seeking to prove unwelcome and unsolicited conduct by the President. Whatever else it was, the President's relationship with Ms. Lewinsky was neither unwanted nor harassing.[41] If the President's testimony under oath is what supports the allegation of abuse of constitutional magnitude, then the immateriality of that testimony makes clear the insufficiency of the Articles recommending impeachment on that basis.

Paula Jones, a former Arkansas state employee, filed a civil lawsuit against the President in 1994 alleging that he had sexually harassed her during an encounter in a hotel room during a government conference. After protracted discovery, the President's motion for summary judgment was granted on the basis that, even if one assumed the truth of *every allegation* made by Jones concerning the President's behavior, Jones failed to prove that she was entitled to any relief as a matter of law. In light of this fundamental weakness in Jones' case, it is exceedingly difficult to establish that the allegedly misleading statements made by the President during his testimony were legally "material" or "capable of influencing" a court.[42] Simply put, Mrs. Jones would have lost her lawsuit regardless of the President's deposition testimony.

In evaluating the Majority's charge, the rulings made by Judge Wright in the *Jones* case must be considered. These are directly relevant to the question whether the President's allegedly false statements could possibly be characterized as violations of the federal law cited by the Referral and relied upon by the Majority. Judge Wright's order excluding evidence concerning Ms. Lewinsky, and her order granting the President's summary judgment motion, clearly establish that any alleged misleading statements by the President concerning his indisputably consensual and non-harassing relationship with Ms. Lewinsky were simply not material matters.

On January 29, 1998, the Independent Counsel intervened in the *Jones* case and moved to

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388 (D.D.C. 1956) (same).

Significantly, the Supreme Court's recent decision in *United States v. Gaudin*, 515 U.S. 506 (1995) strongly suggests the correctness of this standard. There, the Supreme Court considered the question whether, under the federal false statements statute, 18 U.S.C. § 1001, issues of materiality should be decided by the judge or the jury. In his opinion holding that the issue is for the jury, Justice Scalia endorsed the view that a statement is material only if it has a "'natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 U.S. at 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)) (brackets in original). The Court's interpretation of § 1001 as embodying a "capable of influencing" definition of materiality should be applied to the perjury statutes, which are very similar in scope and purpose.

[41] *See* Equal Employment Opportunity Statement: Executive Office of the President; 29 CFR §1604.11a.

[42] *United States v. Barrett*, 111 F.3d 947, 953 (D.C. Cir. 1997).

exclude from that proceeding any evidence regarding Monica Lewinsky.[43] In her order granting that motion, Judge Wright concluded that evidence relating to Monica Lewinsky was not "essential to the core issues in this case."[44] Since Paula Jones' lawyers would have been precluded from introducing any evidence relating to Lewinsky to attack the President's credibility, the President's testimony was not material to the *Jones* case.

On April 1, 1998, Judge Wright granted the President's motion for summary judgment in the *Jones* case.[45] As required by federal law, in reviewing the President's summary judgment motion, Judge Wright assessed the evidence in the case in the light most favorable to Ms. Jones.[46] Nevertheless, Judge Wright concluded that no "rational trier of fact [could] find for [Ms. Jones]," and therefore that there were "no genuine issues for trial[.]"[47] The court's decision undermines the OIC's assumption that the President's testimony regarding Monica Lewinsky could ever be material to the resolution of the specific claims that Ms. Jones made:

> One final matter concerns the alleged suppression of pattern and practice evidence. Whatever relevance such evidence may have to prove other elements of the plaintiff's case, it does not have anything to do with the issues presented by the President's . . . motion[] for summary judgment . . . . Whether other women may have been subjected to workplace harassment, and whether such evidence has allegedly been suppressed, does not change the fact that plaintiff has failed to demonstrate that she

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[43] The President's actions in supposedly denying a civil litigant access to evidence has been frequently cited as one reason that the President's alleged perjury may constitute an impeachable offense. It is ironic, therefore, that it was the Independent Counsel's insistence that the allegations relating to Ms. Lewinsky merited criminal investigation which actually deprived Mrs. Jones of the ability to present evidence concerning Monica Lewinsky to the court.

[44] Judge Wright's order further held that "some of this evidence might even be inadmissible as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence." *Jones v. Clinton,* No. LR-C-94-290, Order dated Jan. 29, 1998, at 2. Federal Rule of Evidence 608(b) governs a party's ability to introduce specific instances of a witness' prior conduct in order to impeach the witness' credibility. The rule provides, as a general matter, that a witness' prior conduct may not be proved by extrinsic evidence. Judge Wright clearly thought it possible that proof of the President's alleged relationship with Monica Lewinsky would be inadmissible because, at best, it was relevant only to the President's credibility. *See also Jones v. Clinton,* No. LR-C-94-290, Order dated Mar. 9, 1998, at 2 (denying motion to reconsider order excluding Lewinsky evidence because "any evidence concerning Ms. Lewinsky would be excluded from the trial of this matter").

[45] *Jones v. Clinton,* No. LR-C-94-290, Memorandum Opinion and Order at 10-11 (E.D. Ark. Apr. 1, 1998).

[46] *Id.* at 3 n.3.

[47] *Id.* at 39.

> has a case worthy of submitting to a jury.[48]

If Jones' claims failed for lack of proof, nothing the President said about Ms. Lewinsky could possibly have affected the outcome of the case.

The presence of Judge Wright during the deposition and her decision to allow certain questions to be posed does not suggest, as some have argued, that the President's responses to those questions were inevitably material to the *Jones* case. During a discovery deposition, only questions that are wholly *irrelevant* to the underlying action will be disallowed. Relevance in the discovery stage of civil litigation is an exceedingly broad standard which is *not* co-extensive with the concept of materiality. The Federal Rules of Civil Procedure provide that discovery may be had on any subject relevant to a pending case, and that the "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).[49] Courts have held, however, that the mere fact that testimony was deemed permissible is not sufficient to establish materiality.

> [T]he credibility of a witness is always at issue, but not every word of a witness' testimony is invariably material. The materiality of a particular snippet of testimony is not automatically established by the simple expedient of proving that the testimony was given.[50]

In sum, not all testimony that a judge permits to be elicited during a pretrial discovery proceeding can satisfy the materiality requirement that the information be likely to influence the outcome of the case.

Some Members of the Majority and the OIC in press releases that it issued during the course of the Committee's hearings[51] have alleged that the materiality of the President's alleged false statements in *Jones v. Clinton* has already been dispositively resolved by the United States Court of Appeals for the District of Columbia Circuit.[52] This assertion is misleading and untrue. The litigation referred to by the OIC involved a legal challenge by Ms. Lewinsky's lawyer, Frank

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[48] *Id.* at 38-39 (emphasis in original).

[49] The drafters of the rule further explained that testimony is proper at a deposition so long as it is part of "a broad search for facts, . . . or any other matter which may aid a party in the preparation or presentation of his case." Fed. R. Civ. P. 26, 1946 Advisory Committee Note.

[50] *United States v. Adams,* 870 F.2d 1140, 1147-48 (6th Cir. 1989).

[51] The practice of the OIC to continue to speak publicly and to issue press releases after it made its' 595(c) Referral to Congress bears note. This report points out the bias, impartiality, and "attitude" with which the Referral was written. The fact that the OIC continued to feel the need to defend itself against all possible criticisms — large and small — demonstrates that it was indeed too vested and partial in this entire event.

[52] Appendices to the Referral (Part 1) H. Doc. 103-311 at 294.

Carter, to a subpoena issued by the OIC for testimony and materials protected by the attorney-client privilege. In seeking to compel testimony that would ordinarily be protected by the attorney-client privilege, the OIC argued that it had reason to believe that the attorney-client relationship had been exploited to facilitate the filing of a false affidavit, which would permit ordinarily privileged material to be disclosed pursuant to the "crime-fraud" exception. In opposing this subpoena to her former attorney, Ms. Lewinsky argued that her affidavit related to matters later excluded from the *Jones* case and, therefore, was not "material" to that proceeding, thereby rendering the truth or falsity of her affidavit legally irrelevant. The D.C. Circuit, in rejecting this argument, did *not* hold that Ms. Lewinsky's affidavit was relevant to the underlying *Jones* litigation. Instead, the Court arrived at the much narrower ruling that Ms. Lewinsky's affidavit was relevant to her motion to quash her own subpoena.

> Lewinsky used the statement in her affidavit . . . to support her motion to quash the subpoena issued in the discovery phase of the Arkansas litigation. . . . There can be no doubt that Lewinsky's statements in her affidavit were . . . predictably capable of affecting this decision. She executed and filed her affidavit for this very purpose.[53]

That Ms. Lewinsky's affidavit was material to *her* own motion to quash is not surprising, but that holding does not compel the conclusion that the President's testimony concerning Ms. Lewinsky was material to the *Jones* case. It is a disservice to the state of the record to suggest that the important threshold question of materiality has been conclusively resolved by the D.C. Circuit. Most importantly, as the Majority has argued time and time again, these are not legal proceedings. Although scholars differ about the materiality issue, it cannot be denied that the President's allegedly false statements played no actual role in depriving Ms. Jones of any relief she was seeking as a civil litigant. To the contrary, the negative publicity created by both her case and the OIC's involvement in her civil discovery processes may well led the President to offer her a generous settlement despite the decision dismissing her claims. These are legitimate, common-sense considerations which should have weighed more heavily in this Committee's deliberations about the gravity of the offenses alleged. When Judge Webber Wright ruled on April 1 that no matter what the President did with Ms. Lewinsky, Paula Jones herself had not proven that she had been harmed, the court's opinion confirmed that the President's statements, whether truthful or not, were not of the grave constitutional significance necessary to support impeachment.

B. The Alleged Perjurious Statements Would Never Merit Prosecution

On December 9, 1998, a panel of five highly regarded former Democratic and Republican federal prosecutors appeared before the Committee and testified that the OIC's case against the President would not have been pursued by a responsible federal prosecutor. It stood to reason, therefore, that if lawyers could agree that the President's conduct would not even merit a criminal

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[53] *In re Sealed Case*, slip op. at 4-6 (D.C. Cir., Nos. 98-3052, 98-3053, 98-3059, May 26, 1998).

prosecution under ordinary circumstances, how could lawmakers in Congress conclude that it amounted to a "high crime?" The bi-partisan panel consisted of:

- Richard J. Davis, former task force leader for the Watergate Special Prosecution Force, and former Assistant Secretary of the Treasury for Enforcement and Operations;

- Edward S.G. Dennis, Jr., former Acting Deputy Attorney General of the United States, former Assistant Attorney General for the Criminal Division of the Department of Justice, and former United States Attorney for the Eastern District of Pennsylvania;

- Ronald K. Noble, former Under Secretary for Enforcement of the Department of the Treasury, former Deputy Assistant Attorney General of the United States, and former Assistant United States Attorney for the Eastern District of Pennsylvania;

- Thomas P. Sullivan, former United States Attorney for the Northern District of Illinois; and

- William F. Weld, former Governor of Massachusetts, former Assistant Attorney General in charge of the Criminal Division of the Department of Justice, former United States Attorney for the District of Massachusetts, and House Judiciary Committee Counsel during Watergate.

In his testimony, Mr. Sullivan told the Committee that federal prosecutions for perjury and obstruction of justice are relatively rare, in part, because they are extremely difficult to prove.[54] He explained that the law of perjury "can be particularly arcane, including the requirements that the government prove beyond a reasonable doubt that the defendant knew his testimony to be false at the time he or she testified, that the alleged false testimony was material, and that any ambiguity or uncertainty about what the question or answer meant must be construed in favor of the defendant."[55] He further stated that, as a general matter, "[f]ederal prosecutors do not use the criminal process in connection with civil litigation involving private parties."[56] That is because "there are well established remedies available to civil litigants who believe perjury or obstruction has occurred."[57] Mr. Sullivan testified that "the evidence set out in

[54] 12/9/98 Tr. at 14-15.

[55] 12/9/98 Tr. at 15.

[56] 12/9/98 Tr. at 15.

[57] 12/9/98 Tr. at 16.

the Starr report would not be prosecuted as a criminal case by a responsible federal prosecutor."[58]

Mr. Davis testified that in "making a prosecution decision as recognized by Justice Department policy, the initial question for any prosecutor is, can the case be won at trial? Simply stated, no prosecutor should bring a case if he or she does not believe that based upon the facts and the law, it is more likely than not that they will prevail at trial."[59] Mr. Davis added that "[c]ases that are likely to be lost cannot be brought simply to make a point, to express a sense of moral outrage, however justified such a sense of outrage might be."[60] Like Mr. Sullivan, Mr. Davis noted that perjury cases are difficult to prosecute because "questions and answers are often imprecise."[61]

Significantly, Mr. Davis noted that in civil lawsuits, "lawyers routinely counsel their clients to answer only the question asked, not to volunteer and not to help out an inarticulate questioner."[62] Based on his review of the OIC's evidence, Mr. Davis concluded that there does not exist a prosecutable case of perjury against the President arising out of his grand jury testimony. That is because the President "acknowledged to the grand jury the existence of an improper relationship with Monica Lewinsky, but argued with prosecutors questioning him that his acknowledged conduct was not a sexual relationship as he understood the definition of that term being used in the *Jones* deposition."[63] Put another way, Mr. Davis testified that it would not be possible to prove that the President perjured himself about his subjective understanding of the definition of "sexual relations" drafted by the Jones attorneys.

Mr. Dennis testified that a criminal conviction of the President "would be extremely difficult to obtain in a court of law" because there "is very weak proof of the criminal intent of the President."[64] In addition, Mr. Dennis told the Committee that the "Lewinsky affair is of questionable materiality to the proceedings in which it was raised."[65] According to Mr. Dennis, perjury and obstruction of justice cases arising out of civil litigation involving private parties are "rare," and "rarer still are criminal investigations in the course of civil litigation in anticipation of

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[58] 12/9/98 Tr. at 17.

[59] 12/9/98 Tr. at 24.

[60] 12/9/98 Tr. at 24.

[61] 12/9/98 Tr. at 24.

[62] 12/9/98 Tr. at 24.

[63] 12/9/98 Tr. at 26.

[64] 12/9/98 Tr. at 32.

[65] 12/9/98 Tr. at 32.

incipient perjury or obstruction of justice."[66] That is because in the latter circumstances, "prosecutors are justifiably concerned about the appearance that government is taking the side of one private party against another."[67] Under the facts of the *Jones* case, Mr. Dennis testified that a criminal prosecution was not warranted and "most likely would fail."[68] He concluded that "[c]ertainly the exercise of sound prosecutorial discretion would not dictate prosecuting such a case."[69]

Mr. Noble testified that "a Federal prosecutor ordinarily would not prosecute a case against a private citizen based on the facts set forth in the Starr referral."[70] He explained that "Federal prosecutors and Federal agents, as a rule, ought to stay out of the private sexual lives of consenting adults."[71] Like his colleagues, Mr. Noble agreed that as a general matter "Federal prosecutors are not asked to bring Federal criminal charges against individuals who have allegedly perjured themselves in connection with civil lawsuits."[72] That is because "[b]y their nature, lawsuits have remedies built into the system. Lying litigants can be exposed to such and lose their lawsuits. The judge overseeing the lawsuit is in the best position to receive evidence about false statements, deceitful conduct and even perjured testimony."[73] Mr. Noble also testified that "[n]o prosecutor would be permitted to bring a prosecution where she believed that there was no chance that an unbiased jury would convict[,]" and for that reason urged the Committee to "consider the impact that a long and no doubt sensationalized trial will have on the country, especially a trial that will not result in a conviction."[74]

Finally, Governor Weld testified that in the Reagan Administration, it was not the policy of the Department of Justice "to seek an indictment based solely on evidence that a prospective defendant had falsely denied committing unlawful adultery or fornication."[75] He also testified that under settled principles of federal prosecution, "the prosecutor has to believe that there is sufficient evidence, admissible evidence, to obtain from a reasonable and unbiased jury a

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[66] 12/9/98 Tr. at 33.

[67] 12/9/98 Tr. at 33.

[68] 12/9/98 Tr. at 34.

[69] 12/9/98 Tr. at 34.

[70] 12/9/98 Tr. at 35.

[71] 12/9/98 Tr. at 39.

[72] 12/9/98 Tr. at 41.

[73] 12/9/98 Tr. at 41.

[74] 12/9/98 Tr. at 45.

[75] 12/9/98 Tr. at 48.

conviction and to sustain it on appeal" before a decision is made to bring a charge against a potential defendant.[76]

Thus, the former federal prosecutors agreed on a number of points. First, they agreed that the criminal law generally is not used to sanction misbehavior that occurs during civil litigation. As Mr. Sullivan explained, "the thrust of what I am saying is that the Federal criminal process simply is not used to determine truth or falsity in statements in civil litigation, and it is particularly true -- I mean, that's true, and it is also even more true when you take a situation, as you have here, that the testimony is even peripheral to the civil case involved."[77] Second, they concurred that testimony concerning the President's relationship with Ms. Lewinsky was not material to the *Jones* lawsuit. Mr. Dennis testified that the "Lewinsky affair is of questionable materiality to the proceedings in which it was raised."[78] Third, the panelists agreed that the OIC's case against the President likely could not be sustained in court. As Mr. Noble put it, "I think that it is fairly clear, and that if a poll were taken of former U.S. attorneys from any administration, you would probably find the overwhelming number of them would agree with the assessment that this case is a loser and just would not be sustained in court."[79]

Fourth, the former prosecutors agreed that the charge of obstruction of justice against the President arising out of his conversations with Betty Currie was weak. In the words of Governor Weld, "I think it [the case for obstruction] is a little thin."[80] And finally, they agreed that a charge should not be brought against a defendant unless it can be sustained at trial. As Mr. Sullivan remarked, "I have had situations where my . . . [law enforcement] agents have said to me after discussion about the evidence -- and we concluded that we cannot get a conviction or it is likely that we will lose -- let's indict him anyway to show him. My response to that is, get out of my office and never come back."[81]

III.
THE ARTICLES OF IMPEACHMENT FAIL TO ESTABLISH IMPEACHABLE OFFENSES

A. Article I Alleging Perjury Before the Grand Jury Fails To Establish Impeachable Offenses

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[76] 12/9/98 Tr. at 81.

[77] 12/9/98 Tr. at 58.

[78] 12/9/98 Tr. at 32.

[79] 12/9/98 Tr. at 59.

[80] 12/9/98 Tr. at 75.

[81] 12/9/98 Tr. at 81.

The Committee has approved an article of impeachment concerning the President's grand jury testimony which alleges perjurious testimony with respect to the following subject matters: "(1) the nature and details of his relationship with a subordinate Government employee; (2) prior perjurious, false and misleading testimony he gave in a Federal civil rights actions brought against him; (3) prior false and misleading statements he allowed his attorney to make to a federal judge in that civil rights action; and (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil actions."

1. The President Did Not Commit Impeachable Offenses When Testifying About "the nature and details of his relationship with a subordinate Government employee"

Specific details of the allegedly perjurious statements described by this subparagraph were not included in the articles. In the absence of such specifics, the Minority has no choice but to presume that the Committee intends to parrot the allegations of grand jury perjury contained in the OIC's Referral. The Referral alleged that the President perjured himself in his grand jury testimony by responding to questions concerning the physical nature of his relationship with Ms. Lewinsky in the following ways:

- The President testified that he understood the definition of "sexual relations" given to him in the *Jones* deposition not to include oral sex performed on him.

- The President asserted that his admittedly intimate contacts with Ms. Lewinsky did not constitute "sexual relations" as the President testified he understood that term to be defined in the *Jones* deposition.

- The President testified that his physical relationship with Ms. Lewinsky did not begin until early 1996, rather than late 1995, as recalled by Ms. Lewinsky.

The Majority Counsel, in his presentation, additionally alleged that the President testified falsely to the grand jury concerning the following issues:

- The exact number of the President's meetings with Ms. Lewinsky.

- The exact number of his telephone conversations with Ms. Lewinksy that included sexual banter.

This Committee has not been presented with clear and convincing evidence that the President's testimony on any of subjects was intentionally false. More importantly, there is no real prospect that a Senate trial would ever find sufficient evidence to convict the President of impeachable offenses based on these allegations.

(a) The President did not commit an impeachable offense when

testifying about his understanding of the definition of "sexual relations" presented to him during his civil deposition in the *Jones* case

It is alleged that the President falsely testified before the grand jury that he genuinely believed that the definition of "sexual relations" presented to him in the *Jones* case did not include oral sex. This charge turns, of course, on the nearly impossible task of demonstrating that the President's was not testifying truthfully about his subjective understanding of a complicated and abstract legal definition of "sexual relations" presented to him for the first time on the day of the *Jones* deposition and modified by the presiding judge in response to the President's objections.

At the beginning of the *Jones* deposition, the President was presented with the following definition of sexual relations:

> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes -
>
> > (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person[.]
> >
> > (2) contact between any part of the person's body or an object and the genitals or anus of another person; or
> >
> > (3) contact between the genitals or anus of the person and any part of another person's body.
> >
> > "Contact" means intentional touching, either directly or through clothing.

The proposed use of this definition by the *Jones* attorney drew heated and protracted objections based on its ambiguous wording and the potential for confusion. The President's lawyer, Robert Bennett, argued: "I think this could really lead to confusion, and I think it's important that the record be clear . . . . I do not want my client answering questions not understanding exactly what these folks are talking about."[82] Counsel for the President's co-defendant, former Arkansas trooper Danny Ferguson, also objected. "Frankly, I think it's a political trick [the definition], and I've told you [Judge Wright] before how I feel about the

[82] Clinton 1/17/98 Depo at 20.

political character of this lawsuit."[83] The President's counsel invited the *Jones* attorneys to questions the President directly about his conduct regardless of the embarrassing nature of the questions. "Why don't they ask him about what happened or what didn't happen?" In retrospect, these objections were especially well-taken since we now know that Jones's attorneys had been extensively debriefed the previous evening by Ms. Lewinsky's confidante, Linda Tripp. Judge Wright, in response to these objections, amended the definition by striking subparts (2) and (3), allowing only subpart (1) to stand. When the plaintiff's attorneys sought to introduce another convoluted definition, Judge Wright, apparently regretting her previous ruling permitting the earlier use of such definitions during questioning, rejected the plaintiff's additional proposed definition due to its confusing nature, and concluded: "I'm not sure Mr. Clinton knows all these definitions, anyway."[84] When the President was later asked by the *Jones* attorneys whether his contacts with Ms. Lewinsky fit within their tortured definition of sexual relations, he understandably denied that this was so.[85]

During the President's August 17, 1998 grand jury testimony, the OIC prosecutor returned to this topic and asked whether the President regarded oral sex as falling within the definition provided to him in the *Jones* deposition.

> Q: [I]s oral sex performed on you within the definition as you understood it, the definition in the *Jones* ...
>
> A: As I understood it, it was not; no.[86]

The President was consistent in his interpretation that sexual relations are distinct from oral sex, and, thus, that his physical relations with Ms. Lewinsky did not meet the definition provided in the *Jones* case. For example, he testified that when he was presented with the definition in the *Jones* case he was very uncomfortable because he had to acknowledge that, in one instance, he had engaged in conduct that met the definition of "sexual relations":

> All I can tell you is, whatever I thought was covered, and I thought about this carefully. And let me just point out, this was uncomfortable for me. I had to acknowledge, because of this definition, that under this definition I had actually had sexual relations with Gennifer Flowers, a person who had spread all kinds of ridiculous, dishonest, exaggerated stories about me for money. And I knew when I did that, it would be leaked. It was. And I was

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[83] Clinton 1/17/98 Depo at 20.

[84] Clinton 1/17/98 Depo at 25.

[85] Clinton 1/17/98 Depo at 78.

[86] Clinton 8/17/98 GJ at 93.

embarrassed. But I did it.

* * * *

Let me remind you, sir, I read this carefully. And I thought about it. I thought about what 'contact' meant. I thought about what 'intent to arouse or gratify' meant. And I had to admit under this definition that I'd actually had sexual relations with Gennifer Flowers. Now, I would rather have taken a whipping than done that, after all the trouble I'd been through with Gennifer Flowers[87]

The lawyers in the *Jones* deposition simply did not ask the question most relevant to uncovering the nature of the physical contact between the President and Ms. Lewinsky. The world now knows why these attorneys asked the questions couched in the definitions they invented. They were, in fact, trying to create the very chaos and confusion that has occurred. They were not seeking information; they already had it from Linda Tripp. What they were seeking was to set the President up. If they had asked real questions, seeking real information, and had raised specific conduct, we might have avoided this charge in the Referral entirely. The President testified that he had no intention of avoiding a question regarding oral sex; he just wasn't asked about it:

Q. Would you have been prepared, if asked by the Jones lawyers, would you have been prepared to answer a question directly about oral sex performed on you by Monica Lewinsky?

A. If the Judge had required me to answer it, of course, I would have answered it. And I would have answered truthfully . . . .[88]

There is no evidence of intent on the President's part to commit perjury in his grand jury appearance - - the President simply explained and re-explained his interpretation of the definition of sexual relations provided to him by the lawyers in the *Jones* case.

When a question is "fundamentally ambiguous," the answers to the questions posed are insufficient as a matter of law to support a perjury conviction.[89] Simply put, *when there is more than one way of understanding the meaning of a question,* and the witness has answered

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[87] Clinton 8/17/98 GJ at 150.

[88] Clinton 8/17/98 GJ at 151.

[89] *See, e.g., United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Tonelli*, 577 F.2d 194, 199 (3d Cir. 1978); *United States v. Bell*, 623 F.2d 1132, 1337 (5th Cir. 1980); *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977).

truthfully as to his understanding, he cannot commit perjury.

Even assuming, for the sake of argument, that the President's definition of sexual relations is too narrow, even in the context of the *Jones* deposition, the record shows at most that the President may have been mistaken in construing the definition too narrowly, not that he intended to lie. It is well established that inaccurate or false testimony which is provided as a result of confusion or mistake cannot form the basis for a perjury charge.[90]

(b) The President did not commit an impeachable offense when testifying about the nature of his intimate contacts with Ms. Lewinsky

Article I also appears to encompass the allegation that the President testified falsely when he denied during his grand jury testimony that his intimate physical contact with Ms. Lewinsky fell within the definition presented to him in the *Jones* deposition. We do not believe that the constitutional responsibilities of this Committee compel a detailed regurgitation of the salacious details concerning the alleged physical contact between the President and Ms. Lewinsky. Considerations of personal privacy and institutional dignity must hold some sway in this process, especially where this factual question, even if dispositively resolved against the President, cannot merit his impeachment.

In a prolonged Senate trial, additional evidence could conceivably be amassed concerning the intimate details of the physical relationship between the President and Ms. Lewinsky, but that is not necessary. The President's alleged misstatements *about this matter* would not warrant the inquiry suggested by the Majority. These were statements made in a civil case that was based on allegations of sexual harassment, not consensual sexual relationships; these were statements made under a very narrow and confusing definition of "sexual relations;" and these were statements not material to the decision in the case. In the end, these statements denying an improper relationship were made with the primary purpose of attempting to conceal what the President himself has acknowledged was a serious lapse of judgment concerning a private matter, rather than a corrupt attempt to impede the administration of justice.

It is equally important to note that the evidence does not provide clear and convincing proof that the President has testified in an intentionally false manner concerning the nature of his intimate contacts with Ms. Lewinsky. Article I rests on the OIC's untenable assumption that there is no possibility that Ms. Lewinsky's memory is inaccurate or that she was, to some extent, untruthful. As the Referral states: "There *can be no contention* that one of them has a lack of memory or is mistaken."[91] Independent Counsel Starr at his November 19, 1998 appearance

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[90] *See United States v. Dunnigan*, 507 U.S. 87, 94 (1993): Department of Justice Manual, at 9-69.214 (Supp. 1997).

[91] Referral at 148.

before the Committee all but stated that Ms. Lewinsky was not to be believed on a variety of issues (*e.g.*, whether she was denied a chance to call her attorney when she was first confronted, whether she was asked to wear a wire to tape record Vernon Jordan and the President, and whether she really believed that "no one asked her to lie, and no one promised her a job for her silence"). The OIC then reiterated the same lack of confidence in Ms. Lewinsky in its December 11, 1998 written responses to the Committee's questions following his November 19 appearance, repeatedly asserted that Ms. Lewinsky's grand jury testimony concerning the conduct of OIC prosecutors was false. For example, the OIC denied the truthfulness of Ms. Lewinsky's sworn testimony that she had been threatened with a jail sentence of 27 years, that her mother had been threatened with prosecution, and that she had been asked to secretly tape record conversations with Betty Currie, Vernon Jordan and possibly the President. As Rep. Watt asked during his questioning of the Independent Counsel, "how are you picking and choosing what you believe from Ms. Lewinsky?"[92]

More specifically, the record is replete with evidence that Ms. Lewinsky's memory, standing alone, does not constitute clear and convincing evidence on the disputed issues of fact concerning her intimate contacts with the President. If the House is going to discharge its constitutional responsibilities to send charges to the Senate only upon "clear and convincing" evidence, it must review the contradictions in the record with respect to Ms. Lewinsky. This is especially true with respect to times that Ms. Lewinsky was contemporaneously describing "the nature and details" of her relationship with the President to her friends and acquaintances -- the very issue about which a trial in the Senate would have to occur. However, the Minority has been seeking, and continues to seek to avoid entirely, any further inquiry into these matters and thereby spare Ms. Lewinsky further personal embarrassment. That is why it has pointed out that the immateriality of these allegedly false statements concerning these matters is dispositive of the issue.

As a general matter, the Independent Counsel's Referral acknowledges (albeit in a footnote) that Ms. Lewinsky has certain credibility problems due to "her perjurious *Jones* affidavit, her efforts to persuade Linda Tripp to commit perjury, her assertion in a recorded conversation that she had been brought up to regard lying as necessary, and her forgery of a letter while in college.[93] As a result, the Independent Counsel placed great weight on statements made by Ms. Lewinsky to her confidantes concerning the nature and character of her physical contacts with the President.[94] Indeed, on the narrow factual question in dispute concerning the exact nature of their physical contacts, Ms. Lewinsky's contemporaneous statements to her associates are the only corroborating evidence offered for Ms. Lewinsky's account. A more detailed examination of the record reveals, however, that the mere fact that, on more than one occasion,

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[92] 11/19/98 Hearing Tr. at 236.

[93] Referral at 12, n. 8.

[94] Referral at 13.

Ms. Lewinsky volunteered information to friends about the details of her relationship with the President is not a reliable indicator of the truthfulness of that information.

For example, Ms. Lewinsky confided to her friend, Kathleen Estep, on one occasion, that the President was brought to her apartment at 2:00 a.m. by the Secret Service.[95] Not only did Ms. Estep conclude that Ms. Lewinsky was lying to her about this incident, but the OIC found no evidence that such a visit had occurred.[96] Similarly, Ms. Lewinsky told her friend, Dale Young, that she had recorded some of the President's late night telephone calls to her.[97] No such recordings were ever recovered and Ms. Lewinsky never told the OIC about such recordings during her extensive debriefings with them. When interviewing for a job in New York, Ms. Lewinsky told one of her interviewers that she had lunch with Hillary Clinton the previous week and that the First Lady had offered to help Ms. Lewinsky find an apartment in New York.[98] It was the impression of the interviewer that "Lewinsky's comments strained credulity."[99]

Ms. Lewinsky also offered untruthful details to her friends about the nature of her intimate contacts with the President. For example, Ms. Lewinsky told a friend about a sexual encounter with the President where she was fully unclothed[100], but told the grand jury that neither she nor the President ever fully disrobed.[101] Ms. Lewinsky told both Ashley Raines and Linda Tripp that her sexual relations with the President included, on occasion "reciprocal oral sex."[102] Ms. Lewinsky told the grand jury, however, that she never received oral sex from the President.[103]

These conflicting accounts are all the evidence available to the Committee on this narrow issue. It is not necessary to conclude, however, that either Ms. Lewinsky or the President is intentionally falsifying their respective accounts of their intimate contacts. The record before us suggests that recollections can vary according to the witness' perspective. For example, Ms.

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[95] Estep 8/23/98 302 at 3.

[96] Estep 8/23/98 302 at 3.

[97] Young 6/23/98 GJ at 48.

[98] Nancy Ridson 1/26/98 302.

[99] Nancy Ridson 3/27/98 302.

[100] Erbland 2/12/98 GJ at 26 ("She told me that she had given him [oral sex] and she had had all of her clothes off, . . "),

[101] "[N]either of us ever really took — completely took off any piece of our clothing, I think specifically because of the possibility of encounters . . ." Lewinsky 8/26/98 GJ at 43-44.

[102] Raines 1/25/98 302 at 1; Tripp 7/2/98 GJ at 101.

[103] Lewinsky 8/6/98 GJ at 19.

Lewinsky testified before the grand jury that she "does not have a memory" of how she "made it clear that she intended to deny" the sexual relationship with the President (as she said in her proffer), but insists she was telling the truth at the time she wrote that.[104] In a remarkable exchange, the OIC prosecutors suggested that one reason for her inability to remember may be her guilt over getting Jordan in trouble:

> Q. But -- and I think you also said you feel some -- I don't know if this is the reason you don't remember it, but -- you have expressed to us that you feel some guilt about Vernon Jordan. Is that correct?
>
> A. Yes.
>
> Q. Okay. Can you tell us why that is?
>
> A. He was the only person who did what he said he was going to do for me and --- in getting me the job. And when I met with Linda on the 13th, when she was wearing a wire, and even in subsequent or previous conversations and subsequent conversations, I attributed things to Mr. Jordan that weren't true because I knew that it had leverage with Linda and that a lot of those things that I said got him into a lot of trouble and I just -- he's a good person.[105]

This is not the only failure of Ms. Lewinsky's recollection concerning Mr. Jordan. For example, Ms. Lewinsky told the OIC in an interview that she *never* explained to Jordan what phone sex was, but testified in her grand jury appearance that she *did*.[106] The OIC's indulgence of the memory lapses of its star witness on a key point in her proffer does not strike the Minority as wholly unreasonable. Instead, the Independent Counsel gave Ms. Lewinsky the benefit of the doubt based on the apparent assumption that recollections can honestly fail concerning subjects that cause the witness emotional pain.[107] On the basis of the record before us, particularly in light of the gravity of this impeachment proceeding, every consideration should also be given to the possibility that the differing recollections of the President and Ms. Lewinsky may be colored by their differing emotional perspectives concerning the intimate events at issue. As Ms. Lewinsky testified before the grand jury, the President's description of the limited nature of their physical contacts was interpreted by her as a repudiation of the emotional component of their relationship

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[104] Lewinsky 8/6/98 GJ at 178-79.

[105] Lewinsky 8/6/98 GJ at 179-180.

[106] *See* Lewinsky 8/6/98 GJ at 143; *cf.* Lewinsky 8/1/98 OIC 302 at 8; Lewinsky 7/27/98 OIC 302 at 9.

[107] In his testimony before the Committee, Independent Counsel Starr reiterated that people can have different perceptions about these kinds of events without one being called a liar.

that reduced it to a mere "service contract."[108] It is incumbent on us to consider the possibility that her emotional perspective could lead a mistaken but good-faith recollection about the nature of their contacts.

Likewise, the President's recollection of the limited nature of their sexual contacts was not a subject of emotional indifference to him. Ms. Lewinsky testified to the grand jury that the President's refusal to engage in specific sexual acts was his way of rationalizing his behavior.[109] Ms. Lewinsky herself described the depth of the President's emotional reaction when he rebuffed her sexual overture to him in August of 1997, several months after the President had ended their relationship. According to Ms. Lewinsky, she was "shocked" about the extent to which the President became "visibly upset" and "emotionally upset" about her overture.[110] The President's public expressions of guilt and remorse over his inappropriate conduct underscore this same point.

In light of the contradictory state of the evidence, the uncertain probative worth of Ms. Lewinsky's contemporaneous statements to friends and the other failures of recollection documented in the record, it seems highly unlikely that a Senate trial will ever be able to adduce clear and convincing evidence that the President intentionally lied to the grand jury about the exact nature of his intimate contacts with Ms. Lewinsky.

(c) The President did not commit an impeachable offense when testifying about the date on which his inappropriate contacts with Ms. Lewinsky began

Article I also alleges that the President made a false statement to the grand jury regarding the timing of the beginning of his relationship with Ms. Lewinsky. The Referral charges the President with making a false statement because he testified to the grand jury that his inappropriate relationship with Ms. Lewinsky began in early 1996, whereas Ms. Lewinsky testified that their relationship began in November 1995. In the Majority Staff's initial presentation to the Committee on October 5, when it was debating whether to recommend the initiation of a formal impeachment inquiry, this particular allegation of false testimony to the grand jury was not even mentioned. During a hearing the Committee conducted on December 1, 1998, the Chairman even stated that this charge was a "particularly weak" one. Now, based on the exact same evidentiary record, the charge has been resurrected. Even assuming Ms. Lewinsky is correct in her recollection, the statement by the President regarding the timing of the relationship is completely immaterial to the grand jury's investigation.

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[108] Lewinsky 8/20/98 GJ at 54.

[109] Lewinsky 8/20/98 GJ at 24.

[110] Lewinsky 8/26/98 GJ at 51-52; *see also* Lewinsky 8/20/98 GJ at 70.

A statement must be material to be perjurious. Certainly the President's testimony concerning the date that his intimate contacts with Ms. Lewinsky began could not have made any difference to the grand jury's inquiry into whether the President lied during the *Jones* deposition about having sexual relations with Ms. Lewinsky. The President has admitted that he had an inappropriate relationship with Ms. Lewinsky. The differing, yet immaterial, recollections of Ms. Lewinsky and the President as to the commencement of the consensual relationship -- a quibble over whether the relationship began in November 1995 or February 1996 -- could not possibly support a charge of criminal perjury, much less an article of impeachment.

Moreover, the evidence in support of the proposition that the President testified falsely on this point is exceedingly slight. The Independent Counsel's Referral supports this charge by arguing that the President was motivated to lie about the date on which his physical relationship with Ms. Lewinsky started because the President did not want to admit having an inappropriate relationship with an *intern*.[111] As support for this assertion, the Referral cites a comment from the President to Ms. Lewinsky where, according to Ms. Lewinsky, the President said that her "pink intern pass" was "going to be a problem."[112] The Referral suggests that the President intentionally misled the grand jury concerning the beginning of his relationship to avoid having to acknowledge inappropriate physical contact with Ms. Lewinsky while she was an intern.[113] This is an extremely unconvincing argument.

First, the President's admission in his grand jury testimony of his inappropriate physical contacts with Ms. Lewinsky sparked an entirely foreseeable firestorm of intense public criticism of the President's conduct. The suggestion that the President intentionally sought to mislead the grand jury based on the hope that such public criticism could be muted by obscuring Ms. Lewinsky's employment status at the time the relationship began seems strained, to say the least. Second, the evidence in the record strongly suggests a much more plausible alternative explanation for the President's comment to Ms. Lewinsky about her intern pass: namely, that he was concerned that this pass did not allow her access to the West Wing without an escort. Ms. Lewinsky confirmed that to be the President's concern when he made the statement to her.[114] The attempt to characterize the President's mere confusion over dates as an intentionally perjurious statement finds no persuasive support in the record.

(d) The President did not commit an impeachable offense when testifying about the number of occasions on which he was alone with Ms. Lewinsky and the number of occasions on which they were having phone sex

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[111] Referral at 149.

[112] Lewinsky 7/30/98 302 at 6.

[113] Referral at 149.

[114] Lewinsky 8/24/98 302 at 5.

The Majority Counsel's presentation, alleged not only the false statements to the grand jury outlined above, but also that the President intentionally perjured himself when he admitted to the grand jury that he had been alone with Ms. Lewinsky on "certain occasions" and that he "also had occasional telephone conversations with Lewinsky that included sexual banter." Incredibly, the Majority Counsel charges that these candid admissions were, in fact, intentionally false because the record suggests that the President was alone with Ms. Lewinsky on twenty occasions and that the President had seventeen phone conversations with Ms. Lewinsky that included sexual banter. The Majority Counsel offered no support for his contention that the President's description was intentionally false except to offer his opinion that "[o]ccasional sounds like once every four months or so doesn't it." In fact, the dictionary defines "occasional" as an event "occurring at irregular or infrequent intervals."[115] The meetings between Ms. Lewinsky and the President were, in fact, "irregular and infrequent."[116] The Majority Counsel also refused to offer any reason why he or the grand jury would be legitimately interested in the exact number of telephone calls between the President and Ms. Lewinsky that included sexual banter. The President was never asked about such phone calls during the *Jones* deposition (because phone sex was plainly not within the definition in that case) and this issue was, therefore, wholly irrelevant to the questions that the grand jury was examining concerning the truth of the President's statements during that deposition. The mere fact that the President chose not to include as many salacious details in his statement to the grand jury as the Independent Counsel included in his Referral hardly constitutes an intentional falsehood, much less an impeachable offense. To even refer to such trivial matters amply demonstrates the underlying partisanship of these proceedings and undermines the Majority's claim that this inquiry is not about sex.

2. The President Did Not Commit An Impeachable Offense When Testifying About His Prior Testimony In The *Jones* Civil Deposition

This subsection of Article I represents a dramatic departure from the approach utilized by the Independent Counsel's Referral by alleging that the President's descriptions and justifications for his allegedly perjurious statements in the *Jones* civil deposition were themselves perjurious. The Majority has offered no formal specifications of which statements fall into this category. Instead, in response to objections stated during public debate about the Article's lack of specificity, the Members indicated an intention to refer the full House and the Senate to the presentation by the Majority Counsel and the record of the debates within the Committee. With these stated intentions as the only available guidance concerning the particulars of this subsection, our review suggests that the following statements are at issue:

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[115] Webster's Collegiate Dictionary (10th ed. 1997).

[116] Referral at 156 n.160; GJ Exhibit ML-7 (chart prepared by OIC based on Lewinsky's testimony listing, *inter alia*, all visits with the President).

- The President's explanation of his response to questions during the *Jones* deposition concerning who had told him that Ms. Lewinsky had been subpoenaed.

- The President's explanation of his response to questions during the *Jones* deposition concerning whether he had exchanged gifts with Ms. Lewinsky.

- The President's explanation of why he characterized Ms. Lewinsky's affidavit as "true" during the *Jones* deposition.

Each of these alleged false statements are analyzed in detail in the following section in connection with Article II, which explains why the President's testimony during *Jones* deposition, as well as his explanation of that testimony during his grand jury appearance, was not intentionally false and did not constitute an impeachable offense. *See* Section III.B, *infra*.

3. The President Did Not Commit An Impeachable Offense When His Attorney Characterized the Contents of Ms. Lewinsky's Affidavit to the Presiding Judge in the *Jones* case

In another departure from the approach taken by the Independent Counsel's Referral, the Majority, without the benefit of any additional evidence, has recycled an allegation that Mr. Starr used solely in support of his claim that the President committed perjury during his civil deposition. This approach bootstraps the same facts into a new and separate allegation of grand jury perjury.

The basis for the allegation in this subsection is the President's failure to volunteer information during the *Jones* deposition when Mr. Bennett, while discussing the appropriate scope of questioning by plaintiff's attorneys, characterized Ms. Lewinsky's affidavit as saying that "there is no absolutely no sex of any kind in any manner, shape or form, with President Clinton . . . ." [117] As a threshold matter, no charge of perjury can exist without some perjurious statement by the defendant. Here, of course, the Majority appears to advance a new theory of criminal liability: the imputed perjurious statement. Notwithstanding the legal irrelevance Mr. Bennett's statement, the President explained in his grand jury testimony that he was not paying close attention to his lawyer's comments.

> I don't believe I ever even focused on what Mr. Bennett said in the exact words he did until I started reading this transcript carefully for this hearing. That moment, that whole argument just passed me by. I was a witness. I was trying to focus on what I said and how I said it.[118]

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[117] Clinton 1/17/98 Depo at 54.

[118] Clinton 1/17/98 Depo at 29.

> I was not paying a great deal of attention to this exchange. I was focusing on my testimony. . . . I'm quite sure that I didn't follow all the interchanges between the lawyers all that carefully. And I don't really believe therefore, that I can say Mr. Bennett's testimony or statement is testimony or is imputable to me. I didn't -- I don't know that I was even paying that much attention to it.[119]

The Majority Counsel argues that this was a perjurious statement because the videotape of the deposition supposedly shows that the President was paying attention. The evaluation of the demeanor of a witness is traditionally reserved to the ultimate fact-finder, but a review of the tape does not reveal any outward sign that the President is in fact following or agreeing with Mr. Bennett's colloquy with the judge. The President appears to be looking in Mr. Bennett's direction, but he neither nods his head nor makes any other facial expression from which his awareness of the import of Mr. Bennett's remarks may be inferred. On many other occasions during the videotaped deposition, the viewer can see the President nodding or making some other gesture of acknowledgment which is not the case in this exchange. In addition, the article fails to state that the President obviously was thinking as fast as he could as he just realized that someone was setting him up with respect to the relationship with Ms. Lewinsky. He was, no doubt, taking every break from questions and answers he could to try to figure out how much the *Jones* attorneys knew and where the questions were heading. It is completely logical to think that he was not paying attention under all of these circumstances.

Finally, it is important to note that, as with all of the other alleged perjurious statements, Judge Wright retained the inherent authority to impose sanctions, including criminal contempt, on the President for his alleged conduct during the deposition. Indeed, Judge Wright was invited to do just that by the *Jones* attorneys, but has, to date, declined to take any such action. We believe that the district judge's forbearance in this matter is a legitimate factor that weighs against the supposed gravity of the allegations leveled against the President.

4. The President Did Not Commit An Impeachable Offense When He Testified About Allegations That He Had Obstructed Justice

In another apparent attempt to bolster the article charging grand jury perjury, the Majority has included new allegations of perjury in the grand jury not detailed in the Independent Counsel's Referral concerning the President's responses to questions about the actions that are alleged to constitute obstruction of justice. It is significant that the Independent Counsel, with all his prosecutorial zeal, declined to "double charge" the President with both obstruction of justice *and* separate charges of perjury based solely on his denials that he committed obstruction of justice. The Majority, however, has shown no similar reluctance to pile on duplicative charges. Once again, without a formal statement of the alleged false statements, the Minority is left to guess from the Majority Counsel's presentation, and other exchanges during Committee debates,

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[119] Clinton 1/17/98 Depo at 58-59.

that this subpart of the article refers to the following statements:

- The President's testimony that he could not recall, but did not dispute, making a 2:00 a.m. telephone call to Ms. Lewinsky on December 17.

- The President's testimony concerning his discussion with Ms. Lewinsky on December 28, during which meeting it is alleged that Ms. Lewinsky asked about what to do in response to any request from the *Jones* lawyers for gifts he had given her.

- The President's testimony concerning his purpose in speaking with his secretary, Betty Currie, following the *Jones* deposition.

As noted above, these allegations essentially restate charges that are contained in Article III, which alleges obstruction of justice. In order to avoid unnecessary duplication (a goal not shared by these needlessly repetitive articles of impeachment), the Minority's views on the substance of these allegations are discussed below in the section addressing Article III. *See* Section III.C, *infra.*

B. Article II's Allegations of Perjury In The *Jones* Civil Deposition Fail To Establish An Impeachable Offense

The second article of impeachment charges the President with unspecified instances of perjurious testimony concerning three broad subject-matter areas: (i) the "nature and details of his relationship with a subordinate Government employee"; (ii) his "knowledge of that employee's involvement and participation in the civil rights action brought against him"; and (iii) his "corrupt efforts to influence the testimony of that employee." Although the alleged perjurious statements contemplated by this article are not identified, the Minority believes that the article contemplates at least the following allegations.

1. The President Did Not Commit An Impeachable Offense When He Testified about the Nature of His Relationship Ms. Lewinsky

During his deposition in the *Jones* case, the President testified that his intimate contact with Ms. Lewinsky could not be accurately characterized as a "sexual relationship," a "sexual affair," or even "sexual relations" as that term was used by Ms. Lewinsky in her affidavit, which was presented to the President during his deposition. It is now a matter of record that the President and Ms. Lewinsky enjoyed intimate contact, but never had sexual intercourse. The question whether the President's responses can be labeled as perjurious turns, therefore, on whether the President testified in an intentionally false manner when he denied various questions inquiring into whether he had "sex" with Ms. Lewinsky. There is substantial evidence in this record that the President's responses, although evasive and misleading, did reflect a genuinely-held and not unreasonable belief that the limited nature of his intimate contacts with Ms.

Lewinsky did not require him to respond affirmatively to the questions put to him on this subject.

The President testified during his grand jury appearance that he understood questions concerning sexual relations to be inquiring into whether he had had intercourse with Ms. Lewinsky

> If you said Jane and Harry have a sexual relationship, and you're not talking about people being drawn into a lawsuit and being given definitions, and then a great effort to trick them in some way, but you are just talking about people in ordinary conversations, I'll bet the grand jurors, if they were talking about two people they know, and said they have a sexual relationship, they meant they were sleeping together; they meant they were having intercourse together.[120]

Ms. Lewinsky was similarly convinced that her contacts with the President did not constitute "sex." In an illegally recorded telephone conversation with Ms. Tripp, Ms. Lewinsky confided that she did not believe that her contacts with the President amounted to sex:

> Tripp: Well, I guess you can count [the President] in a half-assed sort of way.
>
> Lewinsky: Not at all. I never even came close to sleeping with him.
>
> Tripp: Why, because you were standing up.
>
> Lewinsky: We didn't have sex, Linda. Not - - we didn't have sex.
>
> Tripp: Well, what do you call it?
>
> Lewinsky: We fooled around.
>
> Tripp: Oh.
>
> Lewinsky: Not sex.
>
> Tripp: Oh, I don't know. I think if you go to - - if you get to orgasm, that's having sex.
>
> Lewinsky: No, it's not. It's - -

[120] Clinton 8/17/98 GJ at 21.

> Tripp: Its not having - -
>
> Lewinsky: Having sex is having intercourse.[121]

Another friend of Ms. Lewinsky's, Dale Young, testified before the grand jury that Ms. Lewinsky had told her that "she didn't have sex with the President," and that when Ms. Lewinsky referred to sex she meant "intercourse."[122] The genuineness of President Clinton's beliefs on this subject is even supported by the OIC's account of Ms. Lewinsky's testimony during an interview with the FBI:

> [A]fter having a relationship with him, Lewinsky deduced that the President, in his mind, apparently does not consider oral sex to be sex. Sex to him must mean intercourse.[123]

The record is convincing that these beliefs were not only genuinely held, but objectively reasonable. Numerous dictionary definitions support both the President's and Ms. Lewinsky's interpretation of sexual relations as necessarily including intercourse.

> Webster's Third New International Dictionary (1st ed. 1981) at 2082, defines "sexual relations" as "coitus;"
>
> Random House Webster's College Dictionary (1st ed. 1996) at 1229, defines "sexual relations" as "sexual intercourse; coitus."
>
> Merriam-Webster's Collegiate Dictionary (10th ed. 1997) at 1074, defines "sexual relations" as "coitus;"
>
> Black's Law Dictionary (Abridged 6th ed. 1991) at 560, defines "intercourse" as "sexual relations;" and
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> Webster's Tenth Edition defines "sexual relations" as "coitus" which is defined as "intercourse."

In short, the evidence supports only the conclusion that the President's responses with respect to these undefined terms were truthful and good faith responses to indisputably ambiguous questions. There is no evidence to the contrary.

2. The President Did Not Commit An Impeachable Offense When He

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[121] Lewinsky/Tripp 10/3/97 Tr.0018 at 49.

[122] Young 6/23/98 GJ at 91.

[123] App. at 1558 (8/19/98 FBI 302 Form Interview of Ms. Lewinsky).

Testified about Meeting Alone with Lewinsky

Some Minority Members of the Committee have expressed discomfort with the President's responses during the *Jones* deposition to questions about whether he was ever alone with Ms. Lewinsky, some even concluded that they believed his testimony may have been false. The President's counsel, however, has strongly argued that the President's responses on this point cannot be characterized as perjurious.

> President Clinton's deposition testimony regarding whether he was alone with Ms. Lewinsky at various times and places does not constitute perjury. The fundamental flaw in the charge is that it is based on a mischaracterization of the President's testimony -- the President did not testify that he was never alone with Ms. Lewinsky.
>
> Both the Starr Referral and Mr. Schipper's presentation to the Committee start from the incorrect premise that the President testified that he was never alone with Ms. Lewinsky. In fact, the President did not deny that he had been alone with Ms. Lewinsky. For example, the President answered "yes" to the question "your testimony is that it was possible, then, that you were alone with her...?"[124]
>
> Whatever confusion or incompleteness there may have been in the President's testimony about when and where he was alone with Ms. Lewinsky cannot be charged against the President. The *Jones* lawyers failed to follow up on incomplete or unresponsive answers. They were free to ask specific follow-up questions about the frequency or locale of any physical contact, but they did not do so. This failure cannot be used to support a charge of perjury.[125]

In addition to the evidentiary questions raised by the President's counsel, the lack of materiality of any of the President's responses concerning Ms. Lewinsky in the *Jones* litigation undercuts arguments that false statements in this civil deposition could support the criminal charge of perjury, much less constitute an impeachable offense.

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[124] Clinton 1/17/98 Depo at 53. In his grand jury testimony the President stated that he had been alone with Ms. Lewinsky. *See, e.g.*, App. at 481. The term "alone" is vague unless a particular geographic space is identified. For example, Ms. Currie testified that "she considers the term alone to mean that no one else was in the entire Oval Office area." Supp. at 534-35 (1/24/98 FBI Form 302 Interview of Ms. Currie; *see also* Supp. at 665 (7/22/98 grand jury testimony of Ms. Currie) ("I interpret being 'alone' as alone ... [W]e were around, so they were never alone."). Ms. Currie also acknowledged that the President and Ms. Lewinsky were "alone" on certain occasions if alone meant that no one else was in the same room. Supp. at 552-53 (1/27/98 grand jury testimony of Ms. Currie).

[125] *Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives*, pp. 77-78 (Dec. 8, 1998).

3. The President Did Not Commit An Impeachable Offense When He Testified about Gifts He Exchanged with Lewinsky

The President's civil deposition testimony has been seriously mischaracterized by suggestions that the President falsely stated that "he could not recall whether he had given any gifts to Ms. Lewinsky."[126] In fact, the President's response, fairly read, clearly concedes that he had given Ms. Lewinsky gifts, but that he could not specifically recall *what they were*.

> Q. Well, have you given any gifts to Monica Lewinsky?
> A. I don't recall. *Do you know what they were?*[127]

President Clinton confirmed to the grand jury that this was the proper interpretation of his response.

> I think what I meant there was I don't recall what they were, not that I don't recall whether I had given them.[128]

The Majority Counsel, in his December 10 presentation to the Committee, claimed that this response was perjurious on the theory that an answer that "baldly understates a numerical fact" in "response to a specific quantitative inquiry" may be technically true but is actually false.[129] Majority Counsel's belabored construction of the applicable legal principles totally ignores the fact that no "quantitative inquiry" was put to the President on this topic. The President was not asked *how many* gifts he had given to Ms. Lewinsky, but simply *whether* he had given her any gifts. In response to such an inquiry, it is astounding that the Majority Counsel continues to insist that the President's immediate acknowledgment that he had given Ms. Lewinsky gifts amounts to a perjurious statement.[130] The entire theory of alleged perjury by the President concerning gifts rests, therefore, not on the President's *denials* that gifts had been exchanged, but simply on his failure to recall the gifts with specificity.

Before discussing each specific question concerning gifts, it is important to note that the President testified during his grand jury testimony that he was not especially concerned about the *Jones* attorneys discovering that he had exchanged gifts with Monica Lewinsky:

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[126] Referral at 158.

[127] Clinton 1/17/98 Depo. at 75 (emphasis added).

[128] Clinton 8/17/98 GJ at 52:7-8.

[129] Majority Counsel's Presentation (Dec. 10, 1998).

[130] Indeed, the President readily acknowledged having given Ms. Lewinsky certain gifts after they were specifically identified. *See* Clinton 1/17/98 Depo at 75 ("Q. Do you remember giving her an item that had been purchased from The Black Dog store at Martha's Vineyard? A. I do remember that ... .").

> I formed an opinion really early in 1996, once I got into this unfortunate and wrong conduct, that when I stopped it, which I knew I'd have to do and which I should have done a long time before I did, that she would talk about it. Not because Monica Lewinsky is a bad person. She's basically a good girl. She's a good young woman with a good heart and a good mind. I think she is burdened by some unfortunate conditions of her upbringing. But she's basically a good person. But I knew that the minute there was no longer any contact, she would talk about this. She would have to. She couldn't help it. It was, it was a part of her psyche.[131]

The President also testified that he did not view an admission about gifts as necessarily indicating a romantic relationship between himself and Monica Lewinsky:

> And let me also tell you, Mr. Bittman, if you go back and look at my testimony here, I actually asked the *Jones* lawyers for help on one occasion, when they were asking me what gifts I had given her, so they could – I was never hung up on this gift issue. Maybe its because I have a different experience. But, you know, the President gets hundreds of gifts a year, maybe more. I have always given a lot of gifts to people, especially if they give me gifts. And this was no big deal to me. I mean, it's nice. I enjoy it. I gave dozens of personal gifts to people last Christmas. I give gifts to people all the time. Friends of mine give me gifts all the time, give me ties, give me books, give me other things. So, it was just not a big deal.
>
> * * * *
>
> And when I was asked about this in my deposition, even though I was not trying to be helpful particularly to these people that I though were not well-motivated, or being honest or even lawful in their conduct vis-a-vis me, that is, the *Jones* legal team, I did ask them specifically to enumerate the gifts. I asked them to help me because I couldn't remember the specifics. So, all I'm saying is, it didn't – I wasn't troubled by this gift issue.
>
> * * * *
>
> I have always given a lot of people gifts. I have always been given gifts. I do not think there is anything improper about a man giving

[131] Clinton 8/17/98 GJ at 575-76.

> a woman a gift, or a woman giving a man a gift, that necessarily connotes an improper relationship. So, it didn't bother me.[132]

Even Linda Tripp's grand jury testimony confirmed that the President expressed no great alarm to Ms. Lewinsky about the prospect that his gifts to her might be surrendered to the *Jones* attorneys.

> But the interesting thing was his take on that, and so then Monica's take on that, was no big deal. No one seems to – he said it's still just a fishing net and they're just – you know, maybe he bought 25 hat pins and its known that he bought 25 hat pins . . .[133]

The President also pointed out in his own defense that the specificity of the questions put to him by the *Jones* attorneys made it clear to him that they had specific information concerning his receipt of the gifts:

> It was obvious to me by this point in the deposition, in this deposition, that they had, these people had access to a lot of information from somewhere, and I presume it came from Linda Tripp. And I had no interest in not answering their questions about these gifts. I do not believe that gifts are incriminating, nor do I think they are wrong. I think it was a good thing to do. I'm not, I'm still not sorry I gave Monica Lewinsky gifts.[134]

In order to credit the assertion that the President's failures of memory regarding specific gifts were intentionally false statements rather than genuine memory lapses, one has to accept the notion that the President intentionally misled the *Jones* attorneys about gifts that he did not believe would indicate an improper relationship and about which the *Jones* attorneys clearly had specific information. These premises are inherently implausible. The actual facts concerning the specific gifts about which the President was asked quickly reveals the insubstantiality of these allegations.

The hat pin. In response to specific follow-up questions on this topic, the President conceded that he may have given Ms. Lewinsky a hat pin, but that he had no specific recollection of doing so. There is no persuasive evidence that the President falsely denied that he could not recall whether he gave Ms. Lewinsky a hat pin. The President gave Ms. Lewinsky that gift on

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[132] Clinton 8/17/98 GJ at 43, 45 & 46.

[133] Tripp 7/29/98 GJ at 105.

[134] Clinton 8/17/98 GJ at 51-52.

February 28, 1997, almost *eleven months* prior to his deposition in the *Jones* case.[135] Under these circumstances, the President's inability to recall whether he had given this specific item to Ms. Lewinsky is hardly so remarkable as to justify the inference that the President's failure of recollection was an intentionally perjurious statement.[136]

It has been argued that the President must have had a specific recollection of the hat pin by citing to Ms. Lewinsky's testimony that she specifically discussed the hat pin with the President on December 28, 1997, after she received a subpoena from the *Jones* lawyers.[137] According to Ms. Lewinsky, she met with the President on December 28, 1997, and brought up the fact that she had received a subpoena from the *Jones* lawyers asking her to produce, among other things, any hat pin given to her by the President.[138] According to Ms. Lewinsky, the President "said that that had sort of concerned him also and asked me if I had told anyone that he had given me this hat pin and I said no."[139] The entire discussion concerning the *Jones* case, according to Ms. Lewinsky, took "maybe about five -- no more than ten minutes."[140] The President testified to the grand jury that he would not dispute Ms. Lewinsky's recollection, but reiterated that he had no recollection of any reference to the hat pin during that conversation:

> Q. Well, didn't she tell you, Mr. President, that the subpoena specifically called for a hat pin that you had . . . given her?
>
> A. I don't remember that. I remember – sir, I've told you what I remember. That doesn't mean my memory is accurate. A lot of things have happened in the last several months, and a lot of things were happening then. But my memory is she asked me a general question about gifts.[141]

The record is simply inconclusive as to whether the President's failure to recall giving a hat pin

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[135] Referral at 156.

[136] The Referral also misleadingly suggests that the President also spoke with Currie about the hat pin around the same time that Ms. Lewinsky claims to have discussed with the President the request for it by the *Jones* lawyers. Ms. Currie testified that she did not know when she discussed the hatpin with the President, and her description of their conversation strongly supports the conclusion that it occurred shortly after the President presented Ms. Lewinsky with the hat pin on February 28, 1997. Currie 5/6/98 GJ at 142:9-10 ("I think he may have said something 'Did Monica show you the hat pin I gave her . . .'").

[137] Referral at 156.

[138] Lewinsky 8/6/98 GJ at 152.

[139] Lewinsky 8/6/98 GJ at 152.

[140] Lewinsky 8/6/98 GJ at 151:18-19.

[141] Clinton 8/17/98 GJ at 45:9-16.

to Ms. Lewinsky was intentionally false.

In addition, this factual point was not material to the *Jones* lawsuit. The gift of a hatpin would not have signified an inappropriate relationship between the President and Ms. Lewinsky. Indeed, the President readily *conceded* that he may have given Ms. Lewinsky a hatpin and, notwithstanding his inability to summon a specific recollection of that gift, the *Jones* attorneys were free to pose appropriate follow-up questions, which they declined to do.

Book "about" Walt Whitman. When asked if he had ever given Ms. Lewinsky a book "about" Walt Whitman, the President responded by saying that "I give people a lot of gifts, and when people are around I give a lot of things I have at the White House away, so I could have given her a gift, but I don't remember a specific gift."[142] The President had given Ms. Lewinsky a volume of poetry by Walt Whitman called "Leaves of Grass."[143] *Jones'* lawyer, however, inartfully asked the President whether he ever gave Ms. Lewinsky a book "about" Walt Whitman.[144] The allegation that the President responded falsely to this question appears to be premised on the assumption that the President was obligated to guess about what the *Jones* lawyers *intended* to ask and respond accordingly. Our perjury statutes impose no such obligation. Simply put, the President's testimony on this point was not perjurious.

The gold broach. The President also testified that he did not remember giving Ms. Lewinsky a gold broach.[145] Both the Majority Counsel and the Independent Counsel allege that the President knowingly lied in denying any specific recollection of giving the broach to Ms. Lewinsky, but neither has acknowledged that Ms. Lewinsky herself suffered lapses of memory concerning her receipt of that item. For example, in support of its allegation that the President gave Ms. Lewinsky the broach, the Referral directs the reader to the "Chart of Contacts and Gifts" prepared by the OIC from all of the evidence it has received.[146] This chart is described by Ms. Lewinsky during one of her grand jury appearances as a document she prepared in consultation with the Independent Counsel, and that "definitely includes the visits I had with him, as well as most of the gifts we exchanged."[147] Ms. Lewinsky also agreed that the chart was "a pretty accurate rendition or description of [Lewinsky's] memory of all the events."[148] This

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[142] Clinton 1/17/98 Depo. at 75.

[143] Referral at 156.

[144] Clinton 1/17/98 Depo. at 75.

[145] Clinton 1/17/98 Depo. at 75.

[146] Referral at 156 n.160; GJ Exhibit ML-7.

[147] Lewinsky 8/6/98 GJ at 27-28.

[148] Lewinsky 8/6/98 GJ at 28:18-19.

chart, although reviewed by Ms. Lewinsky on several occasions[149] and cited by the Referral in support of the assertion that the President had given Ms. Lewinsky a gold broach[150], does *not* list the gold broach.

A review of all the statements and testimony given by Ms. Lewinsky reveals that a "broach" is only mentioned once in passing as an item included in the box of items given to Currie on December 28, 1997.[151] The broach is not mentioned, however, in other interviews with Ms. Lewinsky concerning gifts.[152] Ms. Lewinsky's repeated failure to recall the broach she received from the President during multiple interviews with the Independent Counsel is certainly relevant to any assessment of the truthfulness of the President's testimony that he did not recall giving that item to her. The Majority, however, makes no attempt to place these facts in their proper context.

Moreover, one of Ms. Lewinsky's confidante's, Neysa Erbland, testified that she had heard about Ms. Lewinsky's receipt of the broach from the President around Christmas of 1996.[153] The more than one-year gap between the time that the President gave the broach to Ms. Lewinsky and the time that he was asked about it during the *Jones* deposition reinforces the reasonableness of his inability to recall that specific gift.

4. The President Did Not Commit An Impeachable Offense When He Testified about Whether He Had Talked with Lewinsky about the Possibility She Would Be Asked to Testify in the *Jones* Case

During the *Jones* deposition, when questioned as to whether he "ever talked to Monica Lewinsky about the possibility that she might be asked to testify?" the President began an answer with "I'm not sure," but then suggested that if he had, it was as part of a conversation in which he joked that every woman he had ever talked to was going to be called as a witness in the Paula

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[149] Lewinsky 8/7/98 302 at 1.

[150] Referral at 156 n.160 ("Ms. Lewinsky testified that the President had given her a gold brooch, . . .")

[151] Lewinsky 7/27/98 302 at 8.

[152] Lewinsky 7/27/98 302 at 14-15 (Lewinsky lists all gifts received from President, but broach is not itemized); *see also* Lewinsky 7/30/98 302 at 19-21 (similar list does not mention a gold broach).

[153] Erbland 2/12/98 GJ at 41. The Referral misleadingly asserts that Lewinsky made "near-contemporaneous" comments about the receipt of the broach to four of her confidantes. Referral at 156 n.160. With the exception of Neysa Erbland, however, three of these witnesses had *no* knowledge as to *when* Lewinsky received the broach from the President and each had heard about or seen the gift at *different* times of the year. Raines 1/29/98 GJ at 53:13-18 (cannot recall whether Lewinsky received broach before or after leaving White House); Ungvari 3/19/98 GJ at 44 (saw either the pin or the broach, but cannot recall which one, at Lewinsky's father's house "this past Thanksgiving"); Tripp 7/29/98 GJ at 105 (recounting discussion about broach after Lewinsky received subpoena in December 1997).

Jones case.[154] This was a truthful response.[155] The President did not *deny* that he had had *other* conversations with Ms. Lewinsky about the *Jones* case. The President expressed uncertainty about whether there were other occasions. The President testified that "*I don't think* we ever had more of a conversation than that about it." when describing the earlier exchange with Ms. Lewinsky over whether she might appear on the witness list.[156] As in so many other instances, the *Jones* attorneys failed to ask appropriate follow-up questions such as "were there any other conversations concerning the possibility that Ms. Lewinsky would testify in the *Jones* case?"

Perjury, of course, requires proof that a defendant knowingly made a false statement as to material facts.[157] As we have already discussed, testimony regarding Ms. Lewinsky was not central to the *Jones* case. Moreover, the following types of answers cannot be characterized as perjurious: literally truthful answers that imply facts that are not true, *see, e.g., United States v. Bronston,* 409 U.S. 352, 358 (1973), truthful answers to questions that are not asked, *see, e.g., United States v. Corr,* 543 F.2d 1042, 1049 (2d Cir. 1976), and failures to correct misleading impressions. *See, e.g., United States v. Earp,* 812 F.2d 917, 919 (4th Cir. 1987). The Supreme Court has made abundantly clear that it is not relevant for perjury purposes whether the witness intends his answer to mislead, or indeed intends a "pattern" of answers to mislead, if the answers are truthful or literally truthful.

Ms. Lewinsky has only testified about one other discussion with the President about the possibility that she "might" be asked to testify. Ms. Lewinsky claims that the President told her during a December 17 phone call that she had appeared on the *Jones* witness list. Subsequent conversations between the President and Ms. Lewinsky about the receipt of her subpoena two days later would not have been responsive to the question posed by the *Jones* attorneys because the "possibility that she might be asked to testify" had become a reality by that point. Even if Ms. Lewinsky's testimony is fully credited, the President's failure to recall that they discussed the possibility that she would be asked to testify in the *Jones* case during their December 17 conversation was an understandable memory lapse. That call was made at 2:00 a.m. and the main purpose of the call was to inform Ms. Lewinsky about the death of Betty Currie's brother.

5. The President Did Not Commit An Impeachable Offense When He Testified about Whether Lewinsky Had Told Him She Had Been Subpoenaed

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[154] Clinton 1/17/98 Depo at 69.

[155] Ms. Lewinsky confirmed the accuracy of the President's recollection of this conversation in her testimony. *See* Lewinsky 8/24/98 302 ("LEWINSKY advised CLINTON may have said during this conversation that every woman he had ever spoken to was going to be on the witness list.").

[156] Clinton 1/17/98 Depo at 70-71.

[157] *United States v. Dunnigan,* 507 U.S. 87, 94 (1993).

It is alleged that the President committed perjury in his deposition when he failed to acknowledge that he knew that Ms. Lewinsky had been subpoenaed at the time he had last seen and spoken to her. The President acknowledged, however, that he knew that Ms. Lewinsky had been subpoenaed, but that he was *not* sure *when* was the last time he had seen and spoken with her (but that it was sometime around Christmas), and that he had discussed with her the possibility that she would have to testify.

The allegation that the President denied knowing that Ms. Lewinsky had been subpoenaed the last time he spoke to her illustrates the problem of taking selected pieces of testimony out of context.

> Q. Did she tell you she had been served with a subpoena in this case?
>
> A. No. I don't know if she had been.[158]

This testimony does not support the charge that the President perjured himself by denying that he knew that Ms. Lewinsky had been subpoenaed the last time he had spoken with her. First, the testimony immediately following this exchange demonstrates both that the President was not hiding that he knew Ms. Lewinsky had been subpoenaed by the time of the deposition and that the *Jones* lawyers were well aware that this was the President's position:

> Q. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
>
> A. I don't think so.
>
> * * * *
>
> A. Bruce Lindsey, I think Bruce Lindsey told me that she was, I think maybe that's the first person [who] told me she was. I want to be as accurate as I can.
>
> …
>
> Q. Did you talk to Mr. Lindsey about what action, if any, should be taken as a result of her being served with a subpoena?
>
> A. No. [159]

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[158] Clinton 1/17/98 Depo at 68.

[159] Clinton 1/17/98 Depo at 68-70.

It is evident from the complete exchange on this subject that the President was not generally denying that he knew that Ms. Lewinsky had been subpoenaed in the *Jones* case. The questions that the *Jones* lawyers were asking the President also make clear that this is what they understood the President's testimony to be.

Second, the President's testimony cannot fairly be read as an express denial of knowledge that Ms. Lewinsky had been subpoenaed the last time he had spoken to her before the deposition. Most importantly, the President was not asked whether he knew that Ms. Lewinsky had been subpoenaed *on December 28th,* which was the last time he had seen her. When the President answered the question, "Did she tell you she had been served with a subpoena in this case?", he plainly was not thinking about December 28th. To the contrary, the President's testimony indicates that he was thoroughly confused about the dates of his last meetings with Ms. Lewinsky, and he made that abundantly clear to the *Jones* lawyers:

> Q. When was the last time you spoke with Monica Lewinsky?
>
> A. I'm trying to remember. Probably sometime before Christmas. She came by to see Betty sometime before Christmas. And she was there talking to her, and I stuck my head out, said hello to her.
>
> Q. Stuck your head out of the Oval Office?
>
> A. Uh-huh, Betty said she was coming by and talked to her, and I said hello to her.
>
> Q. Was that shortly before Christmas or –
>
> A. I'm sorry, I don't remember. Been sometime in December, I think, and I believe -- *that may not be the last time.* I think she came to one of the, one of the Christmas parties.[160]

His statement that he did not know whether she had been subpoenaed directly followed this confused exchange and was not tied to any particular meeting with her. By that time it is totally unclear what date the answer is addressing. Given his confusion, which the *Jones* lawyers made no attempt to resolve, it is difficult to know what was being said, much less to label it false and perjurious.

6. The President Did Not Commit An Impeachable Offense When He

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[160] Clinton 1/17/98 Depo at 68 (emphasis added).

Testified about Who Had Informed Him That Lewinsky Had Received a Subpoena in the *Jones* Case

Article II also appears to encompass the claim that the President perjured himself by failing to identify Vernon Jordan as *one* of the individuals who told him that Ms. Lewinsky had been served with a subpoena. In fact, when asked who had informed him that Ms. Lewinsky had been subpoenaed, the President began to identify the individuals who had conveyed that information to him, but the *Jones* attorneys did not consider the matter sufficiently important to elicit all of the responsive information. To support his perjury claim, the Majority Counsel unfairly rips a single sentence of the *Jones* deposition out of context without ever acknowledging that the President, in response to very next question, began to amend and expand on his answer to the question at issue. The exact sequence is as follows:

> Q. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?
>
> G. I don't think so.
>
> Q. Did you ever talk with Monica Lewinsky about the possibility that she might be asked to testify in this case?
>
> Q. *Bruce Lindsey. I think Bruce Lindsey told me that she was, I think maybe that's the first person who told me she was.*[161]

The *Jones* attorneys then proceeded to question the President about the specifics of his conversation with Lindsey concerning this subject. After the President had responded fully to these questions, the *Jones* attorneys failed to ask the obvious follow-up question that had been invited by the President's use of the qualifier "first": who else besides your lawyers told you that Ms. Lewinsky had been served with a subpoena? Criminal sanctions cannot attach to a deposition answer that is incomplete on its face if the lawyer posing the questions is not even interested enough to pursue obvious follow-up questions. Our system of justice does not impose criminal sanctions "simply because a wily witness succeeds in derailing the questioner -- so long as the witness speaks the literal truth." [162]

The Independent Counsel's Referral also freely speculated that the President's incomplete answer was motivated by his reluctance to mention Jordan, who continues to be investigated by the Independent Counsel for alleged obstruction of justice relating to Webster Hubbell.[163] The

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[161] Clinton 1/17/98 Depo. at 68-69 (emphasis added).

[162] *United States v. Bronston,* 409 U.S. 352, 360 (1973).

[163] Referral at 189.

Independent Counsel's insinuations in this regard, however, studiously ignores the fact that the President truthfully identified Bruce Lindsey as one of the individuals who told him that Lewsinky had been subpoenaed.[164] Lindsey, like Jordan, has long been under an unfair cloud of suspicion resulting from the Independent Counsel's investigation into supposedly "obstructionist" activities. If the President, as the Independent Counsel claims, omitted mentioning Jordan out of concern about "admitting any possible link" between Ms. Lewinsky and a person who was already under investigation for "obstructing justice," then this same logic would have militated against mentioning Lindsey. The Independent Counsel's logically inconsistent speculation only serves to highlight the persistent factual weaknesses in the allegations of criminal wrongdoing that have been uncritically adopted by the Majority.

7. The President Did Not Commit An Impeachable Offense When He Testified about Whether Anyone Had Reported to Him about a Conversation with Ms. Lewinsky Concerning the *Jones* Case in the Two Weeks Prior to the Deposition

During the *Jones* deposition, the President was asked whether, in the "past two weeks" (before January 17) anyone had reported to him that they had had a conversation with Ms. Lewinsky about the *Jones* lawsuit. The President replied he "did not believe so."[165] This allegedly constituted a false statement because Jordan informed the President during a phone call on January 7 that the Lewinsky affidavit had been signed.[166]

The record does not, however, demonstrate that Mr. Jordan told the President about a conversation with Ms. Lewinsky. Jordan made a phone call to the President on January 7 informing him that the Lewinsky affidavit had been signed, but Jordan did not speak with the President about his discussion with Lewinsky on that day.[167] Instead, as Jordan testified before the grand jury, he simply conveyed to the President that the affidavit had been signed (he refers to the conversation with the President as "a simple information flow").[168]

Simply put, the information conveyed by Mr. Jordan to the President on December 7 did not imply that he had talked to Ms. Lewinsky that day. For all the President knew, Jordan learned about the signing of the affidavit from the lawyer that Jordan had put Ms. Lewinsky in touch with, Frank Carter. Indeed, Mr. Jordan had previously transmitted information he learned

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[164] Clinton 1/17/98 Depo at 68-69.

[165] Clinton 1/17/98 Depo at 68-69.

[166] Referral at 187.

[167] Referral at 187.

[168] Referral at 187-88.

from Mr. Carter directly to the President.[169]

8. The President Did Not Commit An Impeachable Offense When He Testified about whether he had heard that Mr. Jordan and Ms. Lewinsky had met to discuss the *Jones* case

When asked during the *Jones* deposition whether the President had heard that Jordan and Ms. Lewinsky had *met* to discuss the *Jones* case; the President recounted his belief that the two had *met* to discuss the job search -- about which the President readily acknowledged an awareness. It is alleged that this was a false statement because the President had talked to Jordan about Ms. Lewinsky's involvement in the *Jones* case.[170]

> Q. Has it ever been reported to you that [Vernon Jordan] met with Monica Lewinsky and talked about this case?
>
> A: I knew that he met with her. I think Betty suggested that he meet with her. Anyway, he met with her. *I, I thought that he talked to her about something else. I didn't know that* -- I thought he had given her some advice about her move to New York.[171]

The President, however, was asked only about his knowledge of *meetings* between Jordan and Ms. Lewinsky concerning the *Jones* case. The assertion that the President "did not recall whether Mr. Jordan had *talked* to Ms. Lewinsky about her involvement in the *Jones* case," is misleading.[172] The President was never simply asked whether he was aware that Jordan had ever *talked* with Ms. Lewinsky about her involvement in the *Jones* case. Instead, the President recounted his belief that the two had met to discuss the job search -- about which the President readily acknowledged an awareness.

The President's failure to recall that Jordan told him of meeting with Ms. Lewinsky concerning the *Jones* case, rather than job search, was not intentionally false. Rather, there is substantial evidence to suggest that the President's belief that the *meetings* between Jordan and Ms. Lewinsky only involved her job search was reasonable because the job search was a major part of the contacts between Ms. Lewinsky and Mr. Jordan. For example, up until December 19, Mr. Jordan's only conversations with Ms. Lewinsky concerned her search for a job in New

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[169] *See* Jordan 5/5/98 GJ at 224-26 (Jordan sometimes relayed information to President concerning Lewinsky that he learned from Carter).

[170] Referral, at 186.

[171] Clinton 1/17/98 Depo at 72 (emphasis added).

[172] Referral at 186.

York.[173] Furthermore, Ms. Lewinsky's job search was one of the topics discussed by Mr. Jordan with the President during their December 19 meeting during which Mr. Jordan told the President that Ms. Lewinsky had been subpoenaed.[174] Mrs. Currie asked Mr. Jordan to help Ms. Lewinsky find a job in New York and testified that it is not possible that the President told her to talk to Mr. Jordan on this topic.[175] Moreover, as Mr. Jordan testified, "Lewinsky was *never* the main topic of any conversation with the President."[176] The President's further response -- that he believed Mr. Jordan met with Ms. Lewinsky to give her advice about her move to New York -- was fully accurate.

C. Article III's Allegations of Obstruction of Justice Fail to Establish an Impeachable Offense

The Committee has approved an article of impeachment alleging that the President obstructed justice. The article contends that the "means used to implement this course of conduct or scheme included one or more of the following acts: (1) on or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading; (2) on or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to give perjurious, false and misleading testimony if and when called to testify personally in that proceeding; (3) on or about December 28, 1997, William Jefferson Clinton corruptly engaged in, encouraged, or supported a scheme to conceal evidence that had been subpoenaed in a Federal civil rights action brought against him; (4) [b]eginning on or about December 7, 1997, and continuing through and including January 14, 1998, William Jefferson Clinton intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action brought against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him; (5) on January 17, 1998, at his deposition in a Federal civil rights action brought against him, William Jefferson Clinton corruptly allowed his attorney to make false and misleading statements to a Federal judge characterizing an affidavit, in order to prevent questioning deemed relevant by the judge. Such false and misleading statements were subsequently acknowledged by his attorney in a communication to that judge.; (6) [o]n or about January 18 and January 20-21, 1998, William Jefferson Clinton related a false and misleading account of events relevant to a Federal civil rights action brought against him to a potential witness in that proceeding, in order to corruptly influence the testimony of that witness; (7) on or about January 21, 23 and 26, 1998, William

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[173] Jordan 3/3/98 GJ at 92.

[174] Jordan 3/3/98 GJ at President. 171 ("I said 'You know. I'm trying to help her get a job and I'm going to continue to do that.'")

[175] Currie 5/6/98 GJ at 169-83.

[176] Jordan 3/5/98 GJ at 28 (emphasis added).

Jefferson Clinton made false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence the testimony of those witnesses. The false and misleading statements made by William Jefferson Clinton were repeated by the witnesses to the grand jury, causing the grand jury to receive false and misleading information."

1. The President did not encourage Ms. Lewinsky to file a false affidavit in the *Jones* case or testify falsely if deposed in that matter.

There is no doubt that Ms. Lewinsky and the President discussed the desirability of having her submit an affidavit in lieu of testifying, but there is no evidence that the President encouraged her to file a *false* affidavit, or encouraged her to lie if she were ultimately required to provide a deposition in the *Jones* case. The President testified during his grand jury appearance that "I believed then, I believe now, that Monica Lewinsky could have sworn out and honest affidavit, that under reasonable circumstances, and without the benefit of what Linda Tripp did to her, would have given her a chance not to be a witness in this case."[177] The distinction between the submission of a truthful and a false affidavit is crucial to the Minority's firm conviction that there is no basis for impeachment. The Majority chooses to simply ignore the fact that the *Jones* case involved a claim of unwelcome, harassing conduct while the President's relationship with Ms. Lewinsky was purely consensual. Ms. Lewinsky was prepared to state truthfully that she was <u>not</u> the subject of harassment or any unwelcome advances, and the filing of an affidavit with that statement might have avoided the need for Ms. Lewinsky to reveal her relationship with the President.[178]

Evidence transmitted to Congress by the Independent Counsel, but ignored by the Majority, is equally critical in assessing the Majority's allegations of obstruction of justice. For example, the President testified that he never asked Ms. Lewinsky to lie, and Ms. Lewinsky similarly testified that the President never told her to submit a false affidavit or to lie in any way.[179] Ms. Lewinsky's words on the subject are instructive. During her final appearance before the grand jury, Ms. Lewinsky testified in response to a grand juror's question that:

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[177] Clinton 8/17/98 GJ at 69. *See also id.* at 77 ("I believed then, I believe today, that she could execute an affidavit which, under reasonable circumstances with fair-minded, non-politically oriented people, would result in her being relieved of the burden to be put through the kind of testimony that, thanks to Linda Tripp's work with you and with the *Jones* lawyers, she would have been put through"); 116 ("I also will tell you that I felt quite comfortable that she could have executed a truthful affidavit, which would not have disclosed the embarrassing details of the relationship that we had had").

[178] The Minority specifically notes, in that regard, that obstruction of justice requires proof of a specific intent to obstruct a judicial proceeding. *United States v. Bashaw,* 982 F.2d 168, 170 (6th Cir. 1992); *United States v. Moon,* 718 F.2d 1219, 1236 (2d Cir. 1983); *United States v. Rasheed,* 663 F.2d 843, 847 (9th Cir. 1981). There simply is no such proof in this case.

[179] Clinton 8/17/98 GJ at 4, 7; Lewinsky 7/27/98 302 at 12.

> I think because of the public nature of how this investigation has been and what the charges aired, that I would just like to say that no one ever asked me to lie and I was never promised a job for my silence.[180]

Ms. Lewinsky made the same point in her earlier proffer to the OIC. She wrote that "[n]either the Pres. nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L to lie."[181] She also stated that she had asked the President if he wanted to see her affidavit before it was filed, and he said he did not.[182] Ms. Lewinsky believed her denial of a sexual relationship with the President to be true because they had never had sexual intercourse.[183] Nor did Ms. Lewinsky contrive that definition for purposes of litigation. Rather, she made the point to Ms. Tripp in a surreptitiously recorded conversation in which Ms. Lewinsky said that "[h]aving sex is having intercourse."[184] Moreover, she deemed the matter to be a personal one, and none of Paula Jones' business.[185]

The Majority also fails to mention Ms. Lewinsky's crucial testimony that her affidavit was in no way contingent on her receiving assistance with her search for employment. Ms. Lewinsky told the OIC's investigators that:

> [t]here was no agreement with the President, JORDAN, or anyone else that LEWINSKY had to sign the *Jones* affidavit before getting a job in New York. LEWINSKY never demanded a job from JORDAN in return for a favorable affidavit. Neither the President nor JORDAN ever told LEWINSKY she had to lie.[186]

Indeed, the evidence makes clear that Ms. Tripp was the <u>only</u> person to suggest a jobs-for-affidavit trade. Ms. Lewinsky repeatedly made that point in her interviews with the OIC's staff, and in her grand jury appearances.[187]

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[180] Lewinsky 8/20/98 GJ at 105.

[181] Lewinsky 2/1/98 Proffer at 10.

[182] Lewinsky 8/2/98 302 at 3.

[183] Lewinsky 2/1/98 Proffer at 10; Lewinsky 7/27/98 OIC 302 at 12.

[184] Tripp Tape 18 at 50.

[185] Lewinsky 8/1/98 302 at 10.

[186] Lewinsky 7/27/98 302 at 10.

[187] Lewinsky 8/2/98 OIC 302 at 7 ("TRIPP told LEWINSKY not to sign the affidavit until LEWINSKY had a job"); Lewinsky 8/6/98 GJ at 182 (reporting that Tripp said, "Monica, promise me you won't sign the affidavit until you get the job. Tell Vernon you won't sign the affidavit until you get the job because if you sign the

In a further effort to support claims of obstruction of justice, the Majority apparently adopts the OIC's argument that the President and Ms. Lewinsky improperly agreed to use "cover stories" to hide their relationship, and that Ms. Lewinsky could use those cover stories if she were unable to avoid a deposition appearance. While the Majority does not specifically articulate the grounds for its charge, the OIC's Referral acknowledges that these cover stories were created long before Ms. Lewinsky was subpoenaed in the *Jones* case. The OIC nevertheless asserts that the stories were unlawfully continued after the subpoena was served, and that the President failed to advise Ms. Lewinsky to abandon them when she prepared her affidavit.[188]

The Minority believes it constitutionally insignificant that two people in an inappropriate workplace relationship would attempt to conceal their relationship. And, far from inculpating the President, the Minority believes that the long-standing cover stories employed by the President and Ms. Lewinsky actually exculpate him. It is obvious that these cover stories were not designed to obstruct justice, but simply to prevent family members, friends, staff, and the public from learning of the President's concededly inappropriate relationship. Indeed, Ms. Lewinsky testified that she and the President did not discuss denying their relationship after Ms. Lewinsky learned she was a witness in the *Jones* case.[189] During one of Ms. Lewinsky's grand jury appearances, the following exchange occurred:

> Q. Is it possible that you had these discussions [about denying the relationship] after you learned that you were a witness in the Paula Jones case?
>
> A. I don't believe so. No.
>
> Q. Can you exclude that possibility?
>
> A. I pretty much can . . . .[190]

Thus, the record actually undermines the Majority's contention that the President intended to obstruct justice.

The bottom line is this: the secrecy surrounding an extramarital relationship, standing alone, is far too weak a foundation on which to construct a criminal case, let alone an impeachment of the President. There simply is no evidence that the President sought to have Ms. Lewinsky file a false affidavit or give false testimony in the *Jones* case.

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affidavit before you get the job, they're never going to give you the job").

[188] Referral at 180.

[189] Lewinsky 8/20/98 GJ at 63-64.

[190] Lewinsky 8/20/98 GJ at 63.

2. The President did not Obstruct Justice by Concealing Gifts that he Gave to Ms. Lewinsky

There is no dispute that the President and Lewinsky exchanged gifts. Nor is it disputed that some of those gifts were transferred by Lewinsky to the President's secretary, Betty Currie, on December 28, 1997, the same day that the President and Lewinsky had a brief meeting at the White House. The article's allegation of obstruction is based on its contention that this transfer of gifts was initiated by the President with the intent to make them unavailable for production in response to a document subpoena served on Lewinsky by lawyers for Paula Jones.[191] Referral at 169-71. A full and fair review of all the relevant testimony strongly suggests that Lewinsky initiated the transfer to Currie without any intervention by the President, and that the President was unconcerned about the possibility that gifts might be produced to the *Jones* lawyers. In fact, the President testified that he told Ms. Lewinsky that she would have to turn over to the *Jones* lawyers whatever gifts she had.[192]

To reach the conclusions contained in this article, the Majority has overlooked key evidence. For example, the Independent Counsel alleges that Lewinsky and the President "discussed the possibility of moving some of the gifts out of her possession." A review of the actual testimony, however, reveals that the Independent Counsel's assertion lacks a basis in the evidence he sent. Ms. Lewinsky testified that when she told the President on December 28, 1997, "maybe I should put the gifts outside my house somewhere or give them to someone, maybe Betty[,]" the President did not respond in the affirmative, but said "I don't know" or "[l]et me think about that."[193] This is hardly the stuff of obstruction.

The Independent Counsel chose to state the President's response, without bothering to mention the other nine times they asked Ms. Lewinsky the question.[194] Moreover, Ms. Currie stated repeatedly that Ms. Lewinsky called her and raised the issue of picking up the gifts and that the President never asked her to call Ms. Lewinsky for the gifts:

> A. My recollection – the best I remember is Monica calling me and

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[191] Referral at 166.

[192] Clinton 8/17/98 GJ at 43. "And I told [Ms. Lewinsky] that if they asked her for gifts, she'd have to give them whatever she had, and that that's what the law was."

[193] Lewinsky 8/6/98 GJ at 152.

[194] Ms. Lewinsky made at least ten distinct statements on this subject during the course of her original proffer, interviews, grand jury testimony and deposition. Although the OIC claims that there was a discussion between Ms. Lewinsky and the President on this subject, the actual testimony does not support the OIC's contention. Lewinsky 2/1/98 proffer at 7; Lewinsky 7/27/98 interview statement at 7; Lewinsky 8/1/98 interview statement at 11; Lewinsky 8/6/98 GJ at 152; Lewinsky 8/13/97 interview statement at 7; Lewinsky 8/20/98 GJ at 65-66 and 70; Lewinsky 8/24 interview statement at 4; Lewinsky 9/3/98 interview statement at 2.

asking me if I'd hold some gifts for her. I said I would.

Q. And did the President know you were holding these things?

A. I don't know.

Q. Didn't he say to you that Monica had something for you to hold?

A. I don't remember that. I don't.[195]

And:

Q. Exactly how [did] that box of gifts come into your possession?

A. I do not recall the President asking me to call about a box of gifts. [196]

The OIC's argument that the President was concerned about the gifts is inconsistent with evidence that, during the meeting on December 28, he gave Lewinsky *additional* presents for Christmas.[197] It strains believability to suggest that the President was concerned enough about the gifts to cause Lewinsky to surrender possession of them, yet at the same time was foolish enough to give her more gifts that would have to be produced on the very same day. The President's testimony is clear that he told Lewinsky she would have to produce any gifts that remained in her possession, and that Lewinsky – and not he -- was worried about having to produce them. [198]

The Referral's conclusion is also unsupported by Currie's testimony that Lewinsky, and not Currie, initiated the telephone call that resulted in Currie retrieving the gifts from Lewinsky's Watergate apartment. According to Currie, Lewinsky called her and expressed concern that people -- whom Currie understood to mean *Newsweek* magazine reporter Michael Isikoff – were asking questions about the gifts.[199] The Independent Counsel acknowledges that "Currie testified that Ms. Lewinsky, not Ms. Currie, placed the call and raised the subject of transferring the gifts[,]" but thereafter discounts Currie's testimony by arguing that she ultimately said that

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[195] Currie 5/6/98 GJ at 105-6.

[196] Currie 7/22/98 GJ at 175-6.

[197] Referral at 168.

[198] Clinton 8/17/98 GJ at 44-47.

[199] Currie 1/27/98 GJ at 57; Currie 5/6/98 GJ at 124.

Lewinsky might have a better recollection of these events.[200]

The Majority claims to have proved that Ms. Currie called Ms. Lewinsky about picking up the gifts, rather than the other way around as Ms. Currie testified, by pointing to a cell phone record (billed at one minute) which reflects a phone call from Ms. Currie to Ms. Lewinsky's number at 3:32 p.m. on December 28th. Aside from the fact that this cell phone record (of a "rounded-up" *one-minute* phone call) proves absolutely nothing about the content of that conversation (or even whether a conversation actually occurred), the Majority fails to note that, according to Ms. Lewinsky's testimony, Ms. Currie came and picked up the gifts at 2:00 p.m. on that day. It seems obvious that a call at 3:32 p.m. was not the call to arrange a pick-up that occurred an hour and a half earlier. The Majority, however, refuses to acknowledge any contradictions between Ms. Lewinsky's account and other evidence.[201]

Ms. Lewinsky, of course, recalled that Ms. Currie initiated the conversation that resulted in the transfer of the gifts. [202] In effect, this article of impeachment is based on an answer to an ambiguous leading question to a witness who acknowledges, as any truthful witness might, the possibility that she "might be wrong."

Given the weight that the Independent Counsel attaches to Ms. Currie's supposed concession, it is surprising to find that the transcript of Ms. Currie's testimony does not support his characterization of what was said. The transcript reveals that when Currie spoke the words on which the OIC relies so heavily, she was not talking about who *initiated* the call to transfer the gifts, but apparently whether, *after she picked the gifts up,* she informed the President of that fact. The actual transcript reads as follows:

> Q. What about the President's knowledge about Monica turning over to you the gifts he had given her?
>
> A. I don't know.
>
> Q. Did you talk to him about it?
>
> A. I don't remember talking to him about that, the gifts.
>
> Q. If Monica said you did, would that not be true?
>
> A. If Monica said I talked to the President about it?

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[200] Referral at 167.

[201] Lewinsky 7/27/98 302 at 8.

[202] Lewinsky 8/6/98 GJ at 154.

Q. Right.

A. Then she may remember better than I. I don't remember.[203]

Read in its full context, in the entire transcript, this highly ambiguous line of questioning is best understood to be inquiring about the President's knowledge *after the fact* that the gifts had actually been transferred. Had the prosecutor been able to support his point directly, he would have relied on the answer to a question like: "Did the President know, in advance, that Monica intended to turn the gifts over to you?" Or, more appropriately, the answer to a question like "Did the President tell you to retrieve the gifts from Monica?" could have been cited in the Referral. The problem is that when those questions were asked, Ms. Currie made quite clear that Ms. Lewinsky initiated the transfer.[204]

In an attempt to bridge the gap between the answers it wanted and the ones Ms. Currie gave, the Referral makes a further unsupported suggestion: because Ms. Currie went to Ms. Lewinsky's apartment to pick up the gifts, she must have initiated the contact because "the person making the extra effort . . . is ordinarily the person requesting the favor."[205] Beyond its facial implausibility, the argument fails for a simple reason: there was no "extra effort" made; Ms. Lewinsky's apartment was directly along a convenient route that Ms. Currie could take to get home from work. Ms. Currie testified that she stopped at Ms. Lewinsky's apartment on her way home.[206] Ms. Currie lives in Arlington, Virginia, and anyone familiar with the metropolitan Washington, D.C. area knows that the entrances to both Highways 66 and 50, which provide ready access to Ms. Currie's residence in Arlington, are both within blocks of Ms. Lewinsky's Watergate apartment.[207] This absence of "extra effort" demonstrates a repeated problem with the Referral -- when it confronts large gaps in the evidence, it fills the void with illogical and unsupported leaps. Such unsubstantiated assumptions should be no basis for an article of impeachment.

3. The President did not Assist Ms. Lewinsky in Obtaining a Job in New York in Order to Influence her Testimony in the *Jones* Case

The Committee has approved an article of impeachment concerning the President's

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[203] Currie 5/6/98 GJ at 125-26.

[204] Currie 1/27/98 GJ at 57-58; Currie 5/6/98 GJ at 105-06. The President similarly denied asking Currie to retrieve any gifts. Clinton 8/17/98 GJ at 114-15.

[205] Referral at 170.

[206] Currie 5/6/98 GJ at 108, 113.

[207] *Id.* at 116.

alleged attempts to find Ms. Lewinsky a job in New York at a time when she may have been a witness against him in the *Jones* case.[208] The evidence, however, shows that the President's attempt to help Ms. Lewinsky find a job in New York had nothing to do with buying her silence or obstructing a legal proceeding.

The article alleges that "the President assisted Ms. Lewinsky in her job search motivated at least in part by his desire to keep her 'on the team' in the *Jones* litigation."[209] This conclusion does not flow from the abundant evidence, which makes clear that Ms. Lewinsky's job search began long before she was identified as a witness in the *Jones* case. On April 5, 1996, Ms. Lewinsky's supervisor at the White House told her that she would need to leave her position in the Legislative Affairs office, and that a job at the Pentagon was available for her.[210] Distraught, she met with the President two days later, and he allegedly promised that he would bring her back to the White House after the November elections.[211] It was common knowledge at the White House that Ms. Lewinsky was transferred because she was deemed to spend too much time in the West Wing.

Ms. Currie, who had befriended Ms. Lewinsky, believed that Ms. Lewinsky had been "wronged" by her transfer.[212] As a result, Ms. Currie took it upon herself to try to find Ms. Lewinsky another job at the White House. Ms. Currie contacted White House Deputy Director of Personnel Marsha Scott and asked Ms. Scott to meet with Ms. Lewinsky, but nothing came of the meeting.[213] When November passed and no White House job materialized, she began to complain to Ms. Currie and ask why the President didn't just order that she be returned.[214] When it became clear that she would never receive another White House job, Ms. Lewinsky decided to move to New York City, where her mother had recently taken up residence. Ms. Lewinsky told the President on July 3, 1997, of her decision.[215]

In October 1997, Ms. Currie contacted White House Deputy Chief of Staff John Podesta, with whom she had a longstanding friendship, to see whether he could assist Ms. Lewinsky in

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[208] Referral at 181.

[209] *Id.* at 185.

[210] Lewinsky 8/6/98 GJ at 61.

[211] *Id.* at 63.

[212] Currie 5/6/98 GJ at 45.

[213] *Id.* at 38.

[214] *Id.* at 160.

[215] Lewinsky 8/6/98 GJ at 67-69.

finding a job in New York.[216] She did so after the President requested only that she do what she could to help Ms. Lewinsky.[217] Some months earlier, in the summer or fall of 1997, White House Chief of Staff Erskine Bowles, in response to a similar request from the President, also mentioned Ms. Lewinsky's name to Mr. Podesta and asked whether any jobs might be available for her at the White House.[218] While efforts to find a White House job failed, Mr. Podesta succeeded in arranging an interview for Ms. Lewinsky with United Nations Ambassador Bill Richardson. Ultimately, Mr. Richardson offered her a position that she declined.

These efforts to find Ms. Lewinsky a job started far too early to have anything to do with the *Jones* case. Moreover, the Majority repeatedly fails to acknowledge an innocent and highly plausible explanation for the President's actions: he wished to help the woman he was involved with, cared for, and felt guilty about hurting. Instead, the Majority relies on a concocted theory of obstruction without the facts to support it.

The OIC -- and presumably the Majority -- makes much of the assistance provided to Ms. Lewinsky by White House personnel. But Mr. Podesta made clear in his testimony before the grand jury that there was nothing unusual about these efforts.[219] The Majority also relies heavily on the job-search assistance provided by Vernon Jordan. However, Ms. Lewinsky made clear in her testimony that she -- and not the President -- first suggested enlisting Mr. Jordan's help.[220] And, as it turns out, the idea for obtaining Mr. Jordan's assistance first arose in a conversation between Ms. Lewinsky and her former friend, Linda Tripp, when one of them -- most likely Mrs. Tripp – suggested that Mr. Jordan might be able to help Lewinsky.[221] In response to Ms. Lewinsky's request, the President suggested that she give him a list of New York jobs in which she might be interested.[222] On her own, Ms. Currie also asked Mr. Jordan to assist Ms. Lewinsky.[223] She and Mr. Jordan were old friends, and she was concerned because Ms. Lewinsky was "frantic" to find a job.[224]

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[216] Currie 1/24/98 OIC 302 at 4.

[217] Currie 5/6/98 GJ at 170.

[218] Bowles 4/2/98 GJ at 70.

[219] Podesta 2/5/98 GJ at 27-29, 39, 41-42; Podesta 6/16/98 GJ at 22.

[220] Lewinsky 8/6/98 GJ at 103-04.

[221] *Id.;* Lewinsky 8/20/98 GJ at 23; Lewinsky 7/27/98 OIC 302 at 5.

[222] Lewinsky 8/6/98 GJ at 104.

[223] Currie 5/6/98 GJ at 176.

[224] *Id.* at 172.

The President never asked Ms. Currie to seek Mr. Jordan's assistance and, although Ms. Currie kept the President advised of her efforts, she -- and not the President -- was the one actively trying to assist Ms. Lewinsky.[225] Mr Jordan confirms that Ms. Lewinsky was referred to him by Ms. Currie, although he acknowledges that he, too, kept the President updated on his efforts.[226] Mr. Jordan routinely tried to assist young people with their careers.[227] Indeed, Mr. Jordan recalled another occasion on which he telephoned Ron Perelman, Chairman of the Board of McAndrews & Forbes Holding Incorporated (the parent company of Revlon, which eventually offered Lewinsky an entry-level position), on behalf of a young lawyer who worked at Mr. Jordan's law firm.[228]

Mr. Jordan also testified, and both Ms. Lewinsky and the President confirmed, that neither told him of their relationship.[229] After her initial meeting with Mr. Jordan in early November 1997, Ms. Lewinsky complained that he was not doing anything to help her find work.[230] Indeed, Ms. Lewinsky contacted Ms. Currie and asked her to speak with Mr. Jordan about why there had been no movement on the job front.[231] Mr. Jordan's conduct is wholly inconsistent with the allegation that he was trying to silence a potentially damaging witness. Mr. Jordan did not exert any pressure on his private sector contacts regarding a job for Ms. Lewinsky.[232]

The Referral unfairly minimizes the job-search efforts of White House personnel that preceded Ms. Lewinsky's December 5 appearance on the witness list in the *Jones* case, and unfairly emphasizes the efforts following that date. A review of the entire record sent to Congress makes clear that efforts to help Ms. Lewinsky began as soon as she was transferred to the Pentagon. In context, the evidence demonstrates that the President himself did little to assist Ms. Lewinsky, and that the efforts he undertook were motivated by a desire to help a person with whom he had been intimate. Indeed, as the President testified, if he had really felt obligated to

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[225] *Id.* at 176, 179.

[226] Jordan 3/3/98 GJ at 65.

[227] *Id.* at 76.

[228] Jordan 3/5/98 GJ at 55.

[229] *Id.* at 79.

[230] Lewinsky 8/6/98 GJ at 105.

[231] *Id.*

[232] Fairbarn 1/29/98 302 at 1; Halperin 3/27/98 302 at 2.

get her a job, he certainly could have accomplished it.[233] The President also testified that he knew that sooner or later his inappropriate contacts with Ms. Lewinsky would become public knowledge.[234] And still he did not get her a job at the White House. Moreover, the President has connections in New York that he never used to get Ms. Lewinsky a job there.[235]

With respect to Ms. Currie, who took a more active role in assisting Ms. Lewinsky, the evidence indicates that she was motivated by a belief that Ms. Lewinsky had been unfairly transferred from her White House position. Finally, the record makes abundantly clear that Mr. Jordan became involved after Ms. Tripp suggested and Ms. Lewinsky concluded that Ms. Lewinsky should ask for Mr. Jordan's assistance.

For her part, Ms. Lewinsky told the grand jury and the Independent Counsel's investigators that "[n]o one ever asked me to lie and I was never promised a job for my silence."[236] It also bears emphasis that Ms. Lewinsky's grand jury testimony on this key point was elicited not by one of the Independent Counsel's prosecutors, but by a grand juror who asked, "Monica, is there anything that you would like to add to your prior testimony[?]"[237] The OIC's failure to elicit that crucial piece of exculpatory testimony is important for Committee members to consider in determining the overall credibility of the investigation and the scope of their own review.

4. The President Did Not Commit an Impeachable Offense When His Counsel Characterized Ms. Lewinsky's Affidavit to the Presiding Judge During the *Jones* Deposition

This subparagraph is indistinguishable from the allegation contained in subparagraph 3 of Article I. The Minority views on why these allegations do not establish an impeachable offense are fully set forth, *supra.*

5. The President Did Not Relate to Ms. Currie A False And Misleading Account of Events Relevant to the *Jones* Suit With an Intent to Influence Her Testimony In Any Legal Proceeding

It is undisputed that the President met with Ms. Currie at the White House the day after

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[233] The President said that he did not order Ms. Lewinsky to be hired at the White House. "I could have done so. I wouldn't do it. She tried for months to get in. She was angry." Clinton 8/17/98 GJ at 123.

[234] Clinton 8/17/98 GJ at 135.

[235] Currie 5/6/98 GJ at 182; Currie 5/14/98 GJ at 57.

[236] Lewinsky 8/20/98 GJ at 105; Lewinsky 7/27/98 OIC 302 at 10.

[237] Lewinsky 8/20/98 GJ at 105.

his deposition in the *Jones* case. Ms. Currie testified that she and the President also spoke a few days after the deposition -- but before the fact of the OIC's grand jury investigation was revealed -- about the President's contacts with Ms. Lewinsky.[238] Majority counsel has argued to the Committee that "Ms. Currie was a prospective witness" in the *Jones* case at the time the President spoke to her, and that by referring to Ms. Currie during his deposition, the President indicated that he "clearly wanted her to be deposed as a witness" in the case.[239] The Majority's allegations find no basis in the record, and are a transparent effort to cast perfectly understandable and lawful conduct in the most sinister light possible.[240]

The simple truth is that the President's actions did not obstruct justice because Ms. Currie was not a witness in any proceeding when they spoke, and the President had no expectation that she would be.[241] Even Mr. Starr acknowledged during his appearance before the Committee that "[t]he evidence is not that she was on a witness list, and we have never said that she was."[242] Nor is it persuasive for the Majority to argue that the President's deposition references to Ms. Currie made it inevitable that her deposition would be taken. The undeniable fact is that following the President's deposition, the *Jones* lawyers never sought to take Ms. Currie's testimony. Indeed, discovery in the *Jones* case was set to close just days after the President's deposition was taken, and it is unlikely that her deposition could have been taken in the few days remaining.

Nor did the President have any way of knowing that the OIC was conducting a grand jury investigation of his relationship with Ms. Lewinsky when he spoke to Ms. Currie. That fact that a grand jury investigation had been commenced was not revealed until the *Washington Post* ran a front-page story on Wednesday, January 21, 1998, entitled "Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones's Lawyers."[243] Thus, not even the Majority can claim that the President endeavored to obstruct Mr. Starr's criminal probe of his consensual sexual relationship with Ms. Lewinsky.

Put in proper context, the facts reveal that the President's statements to Ms. Currie were not motivated by a desire to influence her testimony, but by the President's knowledge that his

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[238] Currie 1/27/98 GJ at 80-82.

[239] Statement of Majority Counsel at 17.

[240] It is worth noting that at least one court has concluded that an obstruction of justice charge cannot be predicated on conduct arising in the context of a civil lawsuit. *Richmark Corp. v. Timber Falling Consultants,* 730 F.Supp. 1525 (D. Or. 1990).

[241] Under federal law, an obstruction of justice charge does not lie unless the defendant knew the witness in question to be involved in a legal proceeding. 2 Leonard B. Sand, John S. Siffert, Walter P. Loughlin, and Steven A. Reiss, *Modern Federal Jury Instructions* ¶ 46.01 at 46-14 (1997).

[242] 11/19/98 Tr. at 192.

[243] Referral at 122.

deposition testimony would be leaked to the media,[244] and that statements regarding Ms. Lewinsky would be contradicted by aggressive press coverage of the story. The President testified in the grand jury that he never expected the OIC to be involved in the *Jones* suit, and that his concern was that the story about Ms. Lewinsky "would break in the press."[245] Questions during the course of the deposition led the President to believe that "obviously someone had given [*Jones*' lawyers] a lot of information, some of which struck me as accurate, some of which struck me as dead wrong."[246] Following his testimony, the President was worried that he had been asked such detailed questions about what, to that point, he viewed as a secret relationship with Ms. Lewinsky. The President's concerns were borne out when, shortly after the deposition, Internet gossip columnist Matt Drudge reported the President's involvement with Ms. Lewinsky. Drudge's story received wide exposure the next morning, January 18, when it surfaced on ABC's *This Week* program.

The President told the grand jury about his reasons for talking to Ms. Currie: "what I was trying to determine was whether my recollection was right and that she was always in the office complex when Monica was there . . . . I was trying to get the facts down. I was trying to understand what the facts were . . . . I was trying to get information in a hurry. I was downloading what I remembered."[247] The President plainly was hopeful that Ms. Currie was unaware of his relationship with Ms. Lewinsky, and was testing to see how much she knew. The state of her knowledge was important not because he expected her to give testimony in a judicial proceeding, but because it would help dictate the media strategy he adopted following a leak of his testimony about Ms. Lewinsky.[248] To that end, the President testified that he "was not trying to get Betty Currie to say something that was untruthful. I was trying to get as much information

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[244] Clinton 8/17/98 GJ at 99. The President explained his state of mind when he appeared at his deposition as follows:

> [m]y goal in this deposition was to be truthful, but not particularly helpful. I did not wish to do the work of the *Jones* lawyers. I deplored what they were doing. I deplored the innocent people they were tormenting and traumatizing. I deplored their illegal leaking. I deplored the fact that they knew, once they knew our evidence, that this was a bogus lawsuit, and that because of the funding they had from my political enemies, they were putting ahead. I deplored it. Clinton 8/17/98 GJ at 81. *See also id.* at 79 ("I wanted to be legal without being particularly helpful").

[245] Clinton 8/17/98 GJ at 55. *See also id.* at 131 ("I thought we were going to be deluged by press comments").

[246] Clinton 8/17/98 GJ at 132.

[247] Clinton 8/17/98 GJ at 55-56.

[248] While the President's efforts to tailor his media strategy in that manner may not be admirable, it certainly is not impeachable, as the Majority plainly conceded when it dropped similar allegations from its article of impeachment charging that the President misused his office.

as quickly as I could."[249]

With some variations in wording, Ms. Currie testified that the President made the following statements to her on January 18 regarding Ms. Lewinsky: (1) "[y]ou were always there when she was there, right? We were never alone;" (2) "[y]ou could see and hear everything;" (3) Monica came on to me, and I never touched her, right?"; and (4) [s]he wanted to have sex with me, and I can't do that."[250] Ms. Currie also testified that a few days later (but before the fact of the OIC's investigation became public), she again talked to the President, and that "it was sort of a recapitulation of what we had talked about Sunday."[251] While the Majority asserts that these questions were an effort by the President to obtain Ms. Currie's acquiescence to those propositions, the totality of her grand jury testimony makes clear that she did not feel pressured by her conversations with the President to change her recollection of events; that she did not believe the President wanted her to say "right" in response to his statements; and that she agreed that the President and Lewinsky generally were not alone because she was near the Oval Office on most occasions when they met.[252]

Ms. Currie testified as follows in the grand jury:

> Q. You testified with respect to the statements as the President made them, and, in particular, the four statements that we've already discussed. You felt at the time that they were technically accurate? Is that a fair assessment of your testimony?
>
> A. That's a fair assessment.[253]

The following exchanges also occurred:

> Q. Now, back again to the four statements that you testified the President made to you that were presented as statements, did you feel pressured when he told you those statements?
>
> A. None whatsoever.
>
> Q. What did you think, or what was going through your mind about

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[249] Clinton 8/17/98 GJ at 56.

[250] Currie 1/27/98 GJ at 71-74.

[251] Currie 1/27/98 GJ at 80-82.

[252] Currie 7/22/98 GJ at 11, 22-23.

[253] Currie 7/22/98 GJ at 18.

what he was doing?

A. At that time I felt that he was -- I want to use the word shocked or surprised that this was an issue, and he was just talking.

* * *

Q. That was your impression that he wanted you to say -- because he would end each of the statements with 'Right?" with a question.

A. I do not remember that he wanted me to say 'Right.' He would say 'Right' and I could have said, 'Wrong.'

Q. But he would end each of those questions with a 'Right?' and you could either say whether it was true or not true?

A. Correct.

Q. Did you feel any pressure to agree with your boss?

A. None.[254]

Significantly, the President testified that when he learned that Ms. Currie had been called to testify before the grand jury, he said, "Betty, just don't worry about me. Just relax, go in there, and tell the truth."[255] The President also testified that "I didn't want her to, to be untruthful to the grand jury. And if her memory was different than mine, it was fine, just go in there and tell them what she thought. So, that's all I remember."[256]

Although the Independent Counsel interviewed the Paula Jones attorneys, they studiously avoided asking them about their intentions with respect to calling Betty Currie as a witness. Moreover, the fact that she was never contacted, never deposed, and never added to the witness list in any way, even after the President's deposition, destroys this obstruction charge.

In sum, the President had no reason to believe that Ms. Currie would be a witness in any proceeding at the time he spoke to her. In contrast, the President knew that once his deposition testimony leaked, the White House would be "deluged" by the media.[257] It is far more likely

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[254] Currie 7/22/98 GJ at 23.

[255] Clinton 8/17/98 GJ at 139.

[256] Clinton 8/17/98 GJ at 141.

[257] Clinton 8/17/98 GJ at 132.

that, when the President spoke to Ms. Currie, his goal was to keep the media and the public from finding out about his relationship with Ms. Lewinsky. Both the President and Betty Currie, the *only* people involved in this event, both agree that the conversation on January 18 was not about testimony, was not intended to pressure her, and was caused by the inquiries from the press, not for any litigation. The President's desire to keep that relationship secret was obvious and understandable, but not illegal, and certainly not grounds to justify impeachment. The Majority's evidence falls far short of establishing the existence of an obstruction of justice or other impeachable offense.

6. The President Did Not Obstruct Justice or Abuse his Power by Denying to his Staff his Inappropriate Contacts with Ms. Lewinsky

The Majority alleges that the President obstructed justice by lying to his staff or to the people around him about his inappropriate contacts with Ms. Lewinsky, knowing that they might repeat those statements in a grand jury. But the President's statements to his staff on January 21, 23, and 26, were made to protect his family from discovering his relationship with Ms. Lewinsky. He could not have known then that his staff would be called before the OIC's grand jury. The President did not want to admit he had an inappropriate relationship. This understandable desire falls far short of establishing an impeachable offense.

The Referral lists the statements that the President allegedly made to various aides, and then how the aides testified to what the President said in their grand jury appearances.[258] When asked leading questions in the grand jury, the President acknowledged that he assumed that various staff members might be called to the grand jury.[259] Based only on that acknowledgment, the Majority alleges a ground for impeachment.

However, in its fervor to construct an impeachable offense, the Majority omits important details. First, what the President was denying to his aides was the fact of his private, sexual relationship. This was not comparable to enlisting aides in misrepresenting the progress and success of our troops during the Vietnam War, or misrepresenting the United States' efforts to divert financial assistance from Iran to help the Contras in Nicaragua, or misrepresenting involvement in the Watergate burglaries. This was a man denying to those with whom he worked that he was having an extra-marital relationship with a young woman. The fact that the man was President, and the co-workers were White House employees, should not elevate this everyday occurrence into a constitutional crisis.

Second, the article does not allege, because there are no facts from which to do so, that the President denied that he had an inappropriate relationship with Ms. Lewinsky for the corrupt purpose of influencing their grand jury testimony. But the President's admission after the fact

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[258] Referral at 123-25, 198-203.

[259] Clinton 8/17/98 GJ at 107.

that some people he talked with might be called to testify in the grand jury is not the same as an admission that he *intended* those people to lie. Indeed, the case cited by the Independent Counsel proves that very point.[260] Criminal convictions require that the actor intend that a person lie. Not one of the individuals identified in the Referral states that the President discussed, or even suggested, that they should testify in any particular way. The point of the President's conversation with the staff had nothing whatsoever to do with the grand jury. It had to do with denying an intimate relationship for the more obvious reasons that these kinds of relationships are always denied. To put the point most simply: does anyone really think the President would have admitted to this relationship even if no grand jury had been sitting?

It is important to note that the President's statements to staff were all made at a time when the media began its firestorm coverage of the OIC's expansion of its jurisdiction. Having announced to the entire country that he was not having a relationship with Lewinsky, it is hardly remarkable that he did the same with his staff. The President was not singling out his staff -- he denied the affair to everyone -- so he was not motivated by a desire to influence their grand jury testimony. This denial comes nowhere close to meeting the threshold for an impeachable offense.

D. Article IV Alleging Abuse of Power Fails To Establish An Impeachable Offense

On November 5, 1998, the Majority sent the President a list of 81 questions that it deemed relevant to its impeachment inquiry. The President responded to those questions on November 27, 1998. The Majority has identified the President's responses to ten of those questions[261] as being "perjurious, false and misleading," and constituting grounds for impeachment.

The manner in which the Majority drafted Article IV causes the Minority considerable concern. Originally, the Majority publicly released a version of the article that contained four clauses.[262] Relying on allegations first propounded by the Independent Counsel, the first clause alleged that the President made misleading statements to the public concerning his relationship with Ms. Lewinsky. Clause two asserted that the President made false statements to aides concerning the relationship knowing that the aides would repeat the statements during appearances before the grand jury. Clause three contended that the President improperly asserted executive privilege to obstruct the OIC's investigation of him, while clause four relied on the President's allegedly perjurious responses to the 81 questions.

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[260] *See United States v. Bordallo*, 857 F.2d 519 (9th Cir. 1988).

[261] The ten responses that form the basis for Article IV are Numbers 19, 20, 24, 26, 27, 34, 42, 43, 52, 53.

[262] Indicative of the highly partisan nature of the process is the fact that the Majority released its proposed articles of impeachment to the public even as Counsel to the President, Charles F.C. Ruff, was testifying before the Committee.

During the Committee's debate on Article IV, Rep. Gekas, a member of the Majority, moved to amend the language of that provision by removing the first three clauses and making conforming changes to the preamble. The Gekas Amendment was approved by a vote of 29 "aye," 5 "no," and 3 "present." The Minority was hard-pressed to understand the reasons for the Majority's sweeping changes to the article that it had proposed just days earlier, and Rep. Schumer requested that the Chairman explain the process by which the article was drafted.[263] The Chairman declined to do so.[264] In an interview with the *Washington Post,* however, Rep. Hutchinson, a member of the Majority, "emphasized that [the Article] had been written by staff attorneys and that '[i]t had never been debated [by the Majority Members]. The [Majority] [M]embers never voted on Article IV."[265] Thus, the Majority offered Article IV even though no Member of the Majority actually voted for it.

The allegation that the President's responses to some of the 81 questions constitute a "misuse and abuse" of his office is curious. In its other articles of impeachment, the Majority elected to charge perjury in the grand jury and perjury during the *Jones* deposition without tying those allegations to any supposed abuse of the Office of the President. Even if one were to assume, for the sake of argument, that the President's responses to some of the 81 questions were false, the Minority fails to understand how those responses could constitute an abuse of power. The text of the revised article reveals a desperate, and ultimately unsuccessful, effort by the Majority to link the President's responses to an official governmental function. The article provides that the President's responses "assumed to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives and exhibited contempt for the inquiry."

The Minority notes that the Majority's language in Article IV is not accidental. During Watergate, Article III of the articles of impeachment charged that President Nixon abused the power of his office by failing to comply with subpoenas for documents and things served on him by the Committee. The Nixon article alleged that the President's failure to respond to the subpoenas interposed the powers of the Presidency against lawful subpoenas of the House of Representatives and, as the Majority has alleged here, that the President "thereby assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House of Representatives."[266] Thus, the present-day Majority has attempted to conjure the ghost of Watergate by couching what are, at best, additional allegations of perjury in terms that are reminiscent of the true abuses of power that occurred

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[263] 12/12/98 Tr. at 15.

[264] 12/12/98 Tr. at 15.

[265] Peter Baker and Juliet Eilperin, *GOP Blocks Democrats' Bid to Debate Censure in House*, Wash. Post, Dec. 13, 1998, at A1.

[266] Report of the Committee on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, House Rep. No. 93-1305, 92nd Cong., 2d Sess. 4 (1974).

during Watergate.

The Minority also takes strong exception to the Majority's efforts to set a "perjury trap" for the President. "A perjury trap is created when the government calls a witness . . . [to testify] for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury."[267] Here, the responses on which the Majority relies to support Article IV all involve subjects on which the President testified either in his *Jones* deposition, or the grand jury, or both.[268] Over and over since his testimony on those occasions, the President has acknowledged that he misled the country, largely to spare himself and his family the embarrassment of revealing his relationship with Ms. Lewinsky.[269] When the Majority propounded its 81 questions to the President, it knew that he would not change his testimony simply to satisfy its demands. In essence, then, the Majority has manufactured a count of impeachment against the President simply by requiring him to respond, in writing, to its demands for additional information.

The President's responses to the 81 questions make clear that the Majority has not identified any *new* conduct of the President that warrants impeachment. Every one of the ten responses on which the Majority relies either quotes directly from, or cites to, earlier testimony that the President gave on the referenced subjects. Presumably, the Majority believes that it would be free to manufacture additional articles of impeachment simply by asking the President over and over again about topics on which he is certain not to change his answers, and then accusing the President of lying each time it did not like his responses. In contrast to Watergate, where the Committee premised its abuse of power allegations on President Nixon's affirmative refusal to comply with Committee subpoenas, the Majority here has simply bootstrapped what it believes to be earlier instances of presidential perjury into a new abuse of power article. The Minority completely rejects the Majority's transparent effort to draw a parallel to the events of 1974.

IV.
THE CREDIBILITY OF THE IMPEACHMENT INQUIRY HAS BEEN COMPROMISED

Aside from the substantive problems we have with both the lax standard of impeachment that has been applied by the Majority, and the many errors in the culpability of conduct identified, by the OIC, we are also concerned about the process which has brought the House to this point. Our concerns derive from both perceived unfairness and bias in the OIC investigation as well as the Committee's inquiry.

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[267] *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991).

[268] Response No. 19 (cover stories); 20 (knowledge of subpoena served on Ms. Lewinsky); 24, 26, 27, 42, 43 (gifts exchanged with Ms. Lewinsky); 34 (Ms. Lewinsky's affidavit) and 52, 53 (statements to Ms. Currie).

[269] *See, e.g.*, 8/17/98 Tr. of Address to the Nation at 1.

A. Bias in OIC Investigation

The OIC's conduct has raised a great many doubts regarding the fairness of an investigation which has brought this body to the brink of an impeachment vote. Collectively, these actions raise the question whether the OIC was motivated by an effort to conduct an impartial investigation or by prosecutorial zeal to damage a President. Our concerns arise from a number of reasons.

First, many of our problems arise from the Independent Counsel law, and its interaction with impeachment proceedings in particular. The law gives little guidance or specification regarding the manner in which impeachment referrals are to occur. As already noted, in this case, the OIC chose to ignore the Watergate precedent of special prosecutor Jaworski who saw fit to provide only unedited grand jury transcripts to the Committee. Instead, Mr. Starr developed his own impeachment standards, and then went out of his way to argue the case for impeachment to the Congress. It was just such authority that allowed the Referral to be characterized as a "referral with an attitude."[270] Similarly, it was Mr. Starr's unbending advocacy which caused his ethics adviser Samuel Dash to resign the day after his congressional testimony.[271]

Second, doubts have been raised regarding the appropriateness of the initial selection of Mr. Starr by the three-judge panel. Questions have been raised regarding the propriety of a luncheon meeting between Judge Sentelle, a member of the three-judge panel, and Senator Faircloth, one of President Clinton's severest political critics, shortly before Mr. Starr's appointment as Independent Counsel. Issues have also arisen regarding the appropriateness of Mr. Starr's continued representation of business interests, such as the tobacco industry, who were involved in litigation directly adverse to positions taken by the President. These concerns were compounded when Mr. Starr tentatively accepted a lucrative academic position at Pepperdine University which was largely funded by Richard Mellon Scaife, another harsh critic of the President.

Third, questions have been raised regarding the appropriateness of Mr. Starr's advocacy

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[270] Linda Greenhouse, *Testing of a President,* N.Y. Times, Sept. 12, 1998, at A1.

[271] In his resignation letter, Professor Dash wrote:

> I resign for a fundamental reason. Against my strong advice, you decided to depart from your usual professional decision-making by accepting the invitation of the House Judiciary Committee to appear before the committee and serve as an aggressive advocate for the proposition that the evidence in your referral demonstrates that the President committed impeachable offenses. In doing this *you have violated your obligations under the Independent Counsel statute and have unlawfully intruded on the power of impeachment which the Constitution gives solely to the House.*

Letter from Samuel Dash, Professor, Georgetown University Law Center, to Kenneth W. Starr, Independent Counsel (Nov. 20, 1998).

in support of Paula Jones with respect to constitutional issues arising in her civil lawsuit against President Clinton. Prior to being named Independent Counsel, a lawyer for Paula Jones approached Mr. Starr about drafting an amicus brief arguing against the President's claim of immunity in the *Jones* case,[272] and Mr. Starr ultimately agreed to represent *pro bono* a conservative women's group, the Independent Women's Forum, in their filing of a legal brief opposing the President on this matter.[273] The representation of the Independent Women's Forum did not end until August 8, 1994, four days after Mr. Starr became Independent Counsel.[274] Mr. Starr also appeared on the MacNeil/Lehrer Newshour to argue against the President's immunity claim.[275]

A fourth concern arises from the fact that the OIC appears to have been made aware of allegations of possible wrongdoing at least one week before he sought to expand his investigation into this area. Based on newspaper accounts and Mr. Starr's own testimony, the following time line can be constructed.

> --In mid-October of 1997, around the time when Linda Tripp began illegally taping her telephone conversations with Monica Lewinsky, someone placed an anonymous phone call to the Rutherford Institute, the conservative organization funding Ms. Jones's lawsuit, saying that the President was having an affair.[276]
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> --On November 21, 1997, David Pyke, one of Ms. Jones's lawyers, called Ms. Tripp to

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[272] *Impeachment Hearing on Inquiry Pursuant to H. Res. 581,* 105th Cong., 2d Sess. 119 (1998).

[273] *Id.* at 123; Declaration of Daniel F. Attridge ¶ 13, *Jones v. Clinton* (D.D.C.) (No. 98-042).

[274] Decl. of Daniel F. Attridge ¶ 13, *Jones v. Clinton* (D.D.C.) (No. 98-042).

[275] *MacNeil/Lehrer NewsHour: Presidential Immunity* (PBS television broadcast, May 24, 1994) (transcript available on Lexis). Also raising concern is the fact that Mr. Starr, as a partner at Kirkland & Ellis, was consulted by, and gave legal advice to, lawyers for Paula Jones on approximately half-a-dozen occasions. *Morning Edition: Questions on Starr-Jones Connection* (NPR radio broadcast, Oct. 15, 1998) (transcript available on Lexis). Richard Porter, another Kirkland & Ellis lawyer and former aide to Vice President Dan Quayle, was asked in May 1994, while the Independent Counsel was a partner there, to serve as counsel to Ms. Jones; Mr. Porter declined the representation but faxed the declaration of a *Jones* witness to the Chicago Tribune. Second Decl. of Daniel F. Attridge ¶ 2, *Jones v. Clinton* (D.D.C.) (No. 98-042). In addition, Mr. Porter suggested that Nelson Lund, formerly a counsel to President Bush, represent Ms. Jones in her lawsuit, but Mr. Lund declined the representation and instead recommended Gilbert Davis and Joseph Cammarata. Robert Novak, *Ex-Bush Aides Helped Jones Find Lawyers,* Chicago Sun-Times, May 15, 1994, at 41. Ms. Jones ultimately hired both Mr. Davis and Mr. Cammarata. *Id.*

[276] Rene Sanchez & David Segal, *Mysterious Efforts Permeate Lewinsky, Jones Allegations,* Wash. Post, Jan. 31, 1998, at A13.

say that Lucianne Goldberg had contacted him about a woman having an affair with the President.[277] Ms. Tripp confirmed for Mr. Pyke that she knew a woman who was having a two-year affair with the President that started when she was a White House intern.[278] When discussing her becoming involved with the *Jones* lawsuit, Ms. Tripp told Mr. Pyke that she should appear to be a hostile witness.[279]

--On November 24, 1997, the *Jones* lawyers subpoenaed Ms. Tripp.[280] Ms. Goldberg, in January of 1998, began to explore how Ms. Tripp could contact the OIC about the Lewinsky affair.[281] Ms. Goldberg contacted Mr. Porter, the Kirkland & Ellis lawyer who had the opportunity to represent Paula Jones, who, in turn, contacted Jerome Marcus, a Philadelphia attorney.[282]

--On January 8, 1998, Mr. Marcus called Paul Rosenzweig, one of the OIC attorneys to convey Ms. Tripp's information.[283]

--On January 9, 1998, Mr. Rosenzweig informed Deputy Independent Counsel Jackie M. Bennett, Jr., what he had heard about a White House intern and the President.[284] Also on that day, Ms. Goldberg spoke to Mr. Conway to get Ms. Tripp a new, more conservative lawyer; Ms. Tripp hired Mr. Conway's recommendation, James Moody.[285]

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[277] *Supplemental Materials to the Referral to the U.S. House of Representatives Pursuant to Title 28, U.S. Code, Section 595(c) Submitted by the Office of Indep. Counsel,* Sept. 9, 1998, H.R. Doc. No. 316, 105th Cong., 2d Sess. 2531-32 (reprinting Lewinsky/Tripp Phone Tr. 005 at 91-102).

[278] *Id.*

[279] *Id.*

[280] Alan C. Miller & Judy Pasternak, *Starr's Office Let Tripp Give Details to Jones' Lawyers,* L.A. Times, Oct. 11, 1998.

[281] *Id.*

[282] *Id.*

[283] *Id.*; The Independent Counsel testified before the Judiciary Committee that "[o]n January 8, an attorney in our office was informed that a witness, who was Linda Tripp, who had been a witness in prior investigations in our office, had information that she wanted to provide. A message was conveyed back that she should provide her information directly." *Impeachment Hearing on Inquiry Pursuant to H. Res. 581,* 105th Cong., 2d Sess. 66 (1998)

[284] Miller & Pasternak, *supra*.

[285] *Id.*

-- On January 12, Ms. Tripp finally called the OIC, herself, and spoke to Mr. Bennett.[286] That night, the OIC promised to seek immunity for Ms. Tripp from federal prosecution for the illegal taping; the OIC also promised to help Ms. Tripp if state authorities began to investigate the taping.[287]

-- On January 16, the Special Division gave permission for the OIC to expand its jurisdiction into the Lewinsky allegations.[288] That day, the OIC gave Ms. Tripp an immunity agreement to protect her from federal prosecution for the taping.[289] Knowing that Ms. Tripp had connections to the *Jones* case, the OIC failed to include in her agreement a clause that prevented Ms. Tripp from speaking to anyone about the OIC's investigation.[290] Ms. Tripp spoke to the *Jones*'s lawyers that night, after speaking to the OIC and after leading the OIC to Ms. Lewinsky at the Ritz-Carlton Hotel, thereby setting up the President for his deposition in the *Jones* case.[291]

In particular, we are concerned that rather than immediately reporting any of these facts to the Department of Justice, Mr. Starr's office sought to create their own exigency which left the Attorney General with little choice but to approve his requested extension in jurisdiction. These concerns are exacerbated by the fact that Mr. Starr failed to disclose any previous contacts between himself and his firm and the *Jones* legal team to the Department of Justice.[292]

Fifth, an ongoing investigation into illegal grand jury leaks by the OIC does not give us much further comfort. On June 19, Chief U.S. District Judge Norma Holloway Johnson issued an order holding that "serious and repetitive" leaks to the news media about the OIC's investigation of the Lewinsky allegations justified an inquiry into whether the OIC broke the rule

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[286] *Id.*

[287] *Id.*

[288] *Appendices to the Referral to the U.S. House of Representatives Pursuant to Title 28, U.S. Code, Section 595(c) Submitted by the Office of the Indep. Counsel*, Sept. 9, 1998, H.R. Doc. No. 311, 105th Cong., 2d Sess. 6 (1998) (reprinting January 16, 1998 Order of the Special Division).

[289] Miller & Pasternak, *supra*.

[290] *Impeachment Hearing on Inquiry Pursuant to H. Res. 581*, 105th Cong., 2d Sess. 126 (1998).

[291] Miller & Pasternak, *supra*.

[292] When members of the OIC went to meet with the Deputy Attorney General to seek permission to expand their jurisdiction to investigate these issues notes were taken by participants at the meeting that were released for the first time by the Committee on December 10, 1998. Reference to those notes indicate that *at no time* did anyone from the OIC even mention to the Justice Department that Mr. Starr or his firm (1) had been contacted to be Ms. Jones's attorney, (2) had given legal advice to Ms. Jones's attorneys, (3) had considered filing a brief on Ms. Jones's behalf, or (4) had helped Ms. Tripp contact the OIC with her illegally obtained tapes.

barring dissemination of grand jury material.[293] Subsequently, in a September 25, 1998 ruling, Judge Johnson appointed a special master to conduct an independent investigation of the alleged OIC leaks of grand jury material, "[d]ue to serious and repetitive prima facie violations of Rule 6(e).[294] To date the court has identified 24 separate instances of possibly illegal grand jury leaks. Whether or not one agrees with the OIC view that it is not illegal to leak information which is merely likely to be submitted to the grand jury, or the D.C. Circuit view that such leaks are illegal,[295] it is not difficult to see that the better course of discretion in a politically charged investigation such as this would have been to avoid leaking any information.

Sixth, we are concerned that the OIC may have violated Department of Justice guidelines in gathering its evidence. The Department of Justice rules provide that an attorney for the government should not communicate with a targeted person who government knows is represented by an attorney.[296] At the time the Independent Counsel confronted Ms. Lewinsky at the Ritz Carlton, she plainly was a target of the newly-expanded investigation. Yet at that initial confrontation with Ms. Lewinsky, the Independent Counsel tried to negotiate an immunity deal with her without her lawyer, Frank Carter, being present.[297]

Finally, and perhaps most seriously, we are deeply concerned that the OIC intentionally omitted or downplayed exculpatory evidence concerning President Clinton in its referral. For example, even though Ms. Lewinsky appeared twice before the grand jury, for a total of nine hours (plus a two hour deposition after the President's grand jury testimony and several more hours of OIC interviews), OIC prosecutors never asked her to state for the record whether she

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[293] Order to Show Cause, Misc. No. 98-55, slip. op. at 4 (D.D.C. June 19, 1998).

[294] *In re Grand Jury Proceedings,* Misc. No. 98-228, 1998 U.S. Dist LEXIS 17290, at *32-*38.

[295] It has long been the rule in the D.C. Circuit that the law against disclosing "matters occurring before the grand jury" prohibits disclosing "not only what has occurred and what is occurring, *but also what is likely to occur*." *In re Motions of Dow Jones & Company,* 1998 U.S. App. LEXIS 8676 (D.C. Cir. May 5, 1998) (emphasis added) (quoting,, *SEC v. Dresser Indus.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980).

[296] DOJ Manual § 9-13.240 ("an attorney for the government should not overtly communicate, or cause another to communicate overtly, with a represented person who the attorney for the government knows is a target of a federal criminal or civil enforcement investigation and who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such a person.").

[297]These tactics also may violate Department of Justice policy which prohibits federal prosecutors from contacting a represented person to discuss an immunity deal without the consent of the attorney representing that person. 28 CFR 77.8. This regulation is intended to ensure that a person's right to counsel is respected. Under this policy, the Independent Counsel never should have contacted Ms. Lewinsky on January 16th and attempted to negotiate an immunity deal with her, without the prior consent of her attorney Frank Carter. In addition, the Independent Counsel may have violated Department of Justice policy by forcing Ms. Lewinsky's mother, Marcia Lewis, to appear twice before the grand jury. It is against Department of Justice policy to subpoena close family member of targets before the grand jury. U.S. Attorney's Manual § 9-23.211.

was encouraged to lie when she submitted her affidavit in the *Jones* case. It was only when a grand juror happened to ask Ms. Lewinsky if she would like to add anything to her testimony, that she stated, "*I would just like to say that no one ever asked me to lie and I was never promised a job for my silence.*"[298]

Similarly, the Referral charges the President with intentionally lying about having sexual relations with Ms. Lewinsky. Yet, OIC prosecutors did not see fit to include in the Referral the statement by Ms. Lewinsky that *she* does not believe that she had sexual relations with the President.[299] In addition, the Referral charges the President with asking Vernon Jordan to secure a job for Ms. Lewinsky in order to keep her from revealing their relationship when she testified in the *Jones* case. The Referral neglects to mention Ms. Lewinsky's statement to the OIC's investigators that "LINDA TRIPP suggested to LEWINSKY that the President should be asked to ask VERNON JORDAN for assistance."[300] The Referral also fails to mention that Ms. Lewinsky testified that Ms. Tripp told her, "Monica, promise me you won't sign the affidavit until you get a job. . . . Tell Vernon you won't sign the affidavit until you get the job. . . ."[301] These same types of concerns animate the problems we have with the OIC's failure to provide prompt notice to the public of its determination to exonerate President Clinton with regard to the Whitewater, Travel Office, and White House file investigations. It became clear at our hearings that the OIC had made this determination before the November elections, yet failed to notify Congress or the public of its findings.

B. Unfairness in Committee Investigation

1. Unfairness in Conducting Committee Inquiry

From the outset, Democrats have insisted that the process for conducting the impeachment inquiry be fair and balanced. We would be remiss if we did not acknowledge that in a few respects we have been able to reach bipartisan accord on procedural matters. For example, when the Majority chose to announce oversight hearings on the History and Background of Impeachment,[302] and the Consequences of Perjury and Related Crimes, we were granted a reasonable opportunity to call our own witnesses. Also, we were able to reach accord concerning permitting Committee staff to review certain materials not initially provided to the Committee from the OIC, and requiring the OIC to respond to additional questions posed by the

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[298] H.R. Doc. No. 311 at 1161 (reprinting Lewinsky 8/20/98 GJ at 105) (emphasis added).

[299] *Supplemental Materials to the Referral to the U.S. House of Representatives Pursuant to Title 28, U.S. Code, Section 595(c) Submitted by the Office of Indep. Counsel*, Sept. 9, 1998, H.R. Doc. No. 316, 105th Cong., 2d Sess. 2664 (reprinting Lewinsky/Tripp Phone Tr. 0018 at 49).

[300] H.R. Doc. No. 311, supra, at 1393 (reprinting Lewinsky 7/27/98 OIC 302 at 5).

[301] *Id.* at 902 (reprinting Lewinsky 8/6/98 GJ, at 182).

[302] Although this hearing should have been called far earlier in the process.

Members in writing. Chairman Hyde also granted Mr. Conyers' request that the Committee consider a censure alternative to impeachment.

Regrettably, these occasional displays of bipartisanship were overshadowed by numerous other actions undertaken by the Committee which were unfair to the Minority members of the Committee, to the President, and, most importantly, to the American people. All too frequently, partisanship, unilateral decision-making, and fishing expeditions were the hallmarks of this inquiry and damaged its credibility even before it started.

As a threshold matter, we were unable to achieve bipartisan consensus for the manner in which the inquiry was to be conducted. When H. Res. 581, authorizing the Committee inquiry was debated on the floor and at the Committee, Democrats offered an alternative resolution which would have allowed for an impeachment inquiry limited to the matters set forth in the OIC Referral, provided for a full debate on the standards of impeachment and a debate on whether the facts alleged rose to that standard, and provided for an orderly process to hear factual deadlines along with a tentative year-end deadline. Unfortunately, the Minority proposal was spurned on each occasion, the Majority sought no compromise, and the resulting inquiry was unfocused and standardless.

We were also distressed by the Committee's complete failure to consider the direct testimony of any factual witness. The Committee gathered none of its own evidence and took testimony from none of its own witnesses. This was compounded by the oft-repeated statement that is up to the Minority and the President to call witnesses to establish his own innocence. As a factual matter, this is incorrect -- in contravention of the Watergate precedent laid down by Chairman Rodino, the Majority repeatedly rebuffed our efforts to obtain additional evidentiary information.[303] In any event, the Majority position represents a breathtaking denial of the President's right to the presumption of innocence and his right to confront any witnesses making accusations against him. Although the Committee is not bound as a matter of House Rules to provide these protections, we believe it is incumbent upon the Committee to provide these basic protections. As Rep. Barbara Jordan (D-TX) observed during the Watergate inquiry, impeachment not only mandates due process, but of "due process quadrupled."[304]

Instead of calling witnesses in order to independently assess their credibility, the Committee chose to rely in total on the OIC Referral and accompanying grand jury transcripts involving testimony solicited by the OIC attorneys. As we describe in more detail above, a principal problem in relying on the OIC Referral is that the case it makes out is largely

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[303] For example, on November 9, Chairman Hyde rejected Mr. Conyers request to issue subpoenas to obtain a variety of evidentiary and witness material. On December 11, the Majority rejected Mr. Scott's motion that the Committee establish a scope of inquiry and hear from witnesses with direct knowledge of the allegations before considering articles of impeachment.

[304] Watergate Impeachment Inquiry, Book I, 349 (April 25, 1974), *cited in* John R. Labovitz, Presidential Impeachment (1978) at 189.

circumstantial, with many of the critical alleged criminal elements provided by inference and surmise, rather than fact. In addition, numerous aspects of the witness testimony are not only confusing, but contradictory.

Conducting a presidential impeachment inquiry in the absence of factual witnesses totally contravenes the Committee's Watergate precedent. During the Watergate inquiry, the Committee heard direct testimony from nine factual witnesses. The Members were also confronted with massive factual detail compiled by the staff, in the form of 650 "statements of information" and more than 7,200 pages of supporting evidentiary material, furnished to each Member of the Committee in 36 notebooks. Committee Members heard recordings from nineteen presidential conversations and dictabelt recollections. Eventually, the Committee became privy to a tape recording of President Nixon ordering the cover-up the Watergate break in shortly after it occurred.[305] None of these independent factual determinations have been conducted in the present inquiry.

The fact that the Committee has received voluminous materials from the OIC does not relieve us of our obligation to conduct our own independent review of the facts. The Constitution is clear in specifying that the "House of Representatives ... shall have the *sole* Power of Impeachment."[306] The Framers crafted this requirement with good reason -- impeachment is a political process is intended to be subject to political accountability. By contrast, the OIC is subject to no such constraints and no such accountability.[307]

Although the impeachment of a federal judge does not provide the same weighty considerations as the impeachment of a president, it is instructive to note that in such contexts the Committee has chosen to call its own witnesses in order to develop an independent case against the judge charged with misconduct. For example, when Judge Nixon was impeached in 1989, even though he had already been convicted in a jury trial with the full panoply of due process rights, the Committee conducted seven full days of hearings during which nine witnesses testified. An even more telling precedent concerns the 1988 impeachment of Judge Hastings. His impeachment was considered pursuant to a referral by the Judicial Conference under 28 U.S.C. § 372(c)(7)(B). Very much like the OIC Referral, the Judicial Conference included a comprehensive report of 841 pages, detailing a variety of potentially impeachable conduct, and including a review of numerous district court records, FBI files, Justice Department investigatory files, grand jury materials, bank, financial and other records, and the locating and interviewing of numerous witnesses. Notwithstanding the magnitude and comprehensiveness of the Judicial

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[305] *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93rd Cong., 2d Sess., at 9, 166.

[306] U.S. Const. Art. II, Sec. 2 (emphasis supplied).

[307] *See e.g.*, Julie R. O'Sullivan, *The Interaction between Impeachment and the Independent Counsel Statute*, 86 Geo. L. J. 2193 (1998); Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, __ Stan. L. Rev. __ (1998).

Conference Referral, during Judge Hastings' impeachment the Committee opted to hold seven days of hearings during which 12 witnesses testified. An additional 60 witnesses were separately interviewed or deposed.

In failing to call any witnesses who could make out a case against President Clinton and subjecting such witnesses to cross examination, the Majority did not merely deny the President of some trivial rules of procedure. Rather, the Committee has undercut the very cornerstone of our nation's sense of fairness and due process. Summarizing this long and distinguished heritage, the Supreme Court wrote in 1895 that the presumption of innocence "is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in the heart of every judge and juryman."[308] The presumption of innocence has been traced to Deuteronomy, and was embodied in the laws of ancient Rome, Sparta and Athens.[309]

The right to confront and cross-examine one's accusers is specifically referenced in the Sixth Amendment to the Bill of Rights.[310] Justice Frankfurter has eloquently written that "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[311] The leading treatise on evidence, written by Professor Wigmore, declares that "[t]he belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement ... should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.[312] Significantly, these critical protections are not limited to criminal trials, they have been afforded to parties in numerous other legal contexts.[313]

When the allegations that the President undertook efforts to obstruct Kathleen Willey's testimony led nowhere, the Majority expanded the impeachment inquiry to include allegations

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[308] *Coffin v. United States*, 156 U.S. 432, 456 (1895).

[309] *Id.* at 454.

[310] In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI.

[311] *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951).

[312] 5 Wigmore on Evidence (3d ed. 1940) § 1367.

[313] *See e.g., In re Gault*, 387 U.S. 1 (1967) (due process protections held to apply in non-criminal juvenile proceedings); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (due process requirements applicable in context of termination of welfare benefits).

that the President violated federal campaign finance laws.[314] The Majority took this course despite the fact that both the Senate Governmental Affairs Committee and the House Government Reform and Oversight Committee had investigated the same allegations to no avail. The Republicans on the Judiciary Committee succeeded in their motion to subpoena and depose FBI Director Louis Freeh and Justice Department Campaign Finance Task Force Chief Charles LaBella.[315] The Republicans ultimately canceled all campaign finance-related fishing expeditions.[316]

The rationale for canceling the depositions would be unclear except for the fact that, contemporaneous to scheduling depositions, the Majority was making efforts to view memoranda prepared by Director Freeh and Mr. LaBella for a Justice Department investigation of the alleged campaign finance violations. The U.S. District Court for the District of Columbia, which controlled access to the memoranda pursuant to a grand jury investigation of the alleged violations, issued a ruling that allowed one staff member from the Majority side of the Committee and one staff member from the Minority side of the Committee to review the memoranda.[317] It was after the Majority reviewed the memoranda that the depositions of Director Freeh and Mr. LaBella were canceled finally. The decision to cancel the depositions in light of whatever information was gleaned from the memoranda reveals that the claims about campaign finance violations had no foundation – a conclusion already reached by Attorney General Janet Reno in her decision not to appoint independent counsels to investigate either the President or Vice President Al Gore.[318]

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[314] Juliet Eilperin & Ruth Marcus, *Both Sides Harden Impeachment Views: Widening of Probe Irks Democrats*, WASH. POST, Dec. 2, 1998, at A1; Alison Mitchell, *Panel Seeks Fund-Raising Memos, Stirring Democrats*, N.Y. TIMES, Dec. 2, 1998, at A20.

[315] Eilperin & Marcus, *supra*; Mitchell, *supra*.

[316] Guy Gugliotta & Juliet Eilperin, *Panel Gives Up Campaign Probe*, WASH. POST, Dec. 4, 1998, at A1; Alison Mitchell, *Republicans Drop Bid to Investigate Clinton Campaign*, N.Y. TIMES, Dec. 4, 1998, at A1.

[317] Peter Baker & Juliet Eilperin, *'Vigorous Defense' of Clinton is Pledged*, WASH. POST, Dec. 3, 1998, at A1.

[318] In addition, the following instances of procedural unfairness occurred in connection with our inquiry:

1) On September 11, 1998, the resolution relating to the release of the OIC materials, H. Res. 525, was introduced in the absence of bipartisan agreement. In particular, the Majority failed to offer the President an opportunity to review and respond to the Referral before it was released, and reneged on their promise that the initial review of the materials would be limited to the Chairman and Ranking Member in order to minimize the risk of damaging leaks.

2) On September 15, 1998, the Majority unilaterally sought to obtain access to a videotaped copy of the President's January 17 deposition in the Paula Jones case.

3) On November 5, 1998, Chairman Hyde unilaterally issued a set of 81 questions to President Clinton for his response. The questions were not approved by any other Member of the Committee, and no advance copy was

2. Unfairness in the Drafting of the Articles of Impeachment

The Majority also failed to inform the Minority, the President, or the public in any timely manner what the charges against the President would be. The Referral, itself, listed eleven acts that could constitute ground for impeachment of the President.[319] At his presentation before the Committee on October 5, 1998, Majority counsel, David Schippers, listed fifteen acts that could constitute grounds for impeachment.[320] First, we heard there were eleven charges, then fifteen, then eleven again, and then three.

This is in stark contrast with the Watergate inquiry, which not only achieved significant bipartisan agreement on the final articles of impeachment, but achieved even broader consensus on the procedural fairness afforded President Nixon. This was illustrated by the fact that immediately before the Committee voted out impeachment articles, a bipartisan group of Members appeared together on television and stated that the inquiry had been conducted fairly and was nonpartisan.[321] During the Watergate inquiry, the chief Majority and Minority Counsels (John Doar and Albert Jenner, Jr.) coordinated all investigative work on a bipartisan basis, and both ultimately recommended the course of impeachment to the Committee.

On December 9, 1998, the Majority introduced a tentative draft of four articles of impeachment without having had one, single day of hearings on the evidence. The Minority members received this draft only one day before members were to comment on them in open session and near the end of the day that counsel to the President, Charles F.C. Ruff, made his presentation to the Committee. The Majority often complained that the President was ignoring

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provided to the Minority.

4) On November 17, 1998, the Majority rejected a request to grant the President's lawyers two hours to question OIC Starr during his testimony. No time limitation on questioning by President Nixon's lawyers was over imposed during the Watergate Inquiry.

5) On November 24, 1998, Chairman Hyde unilaterally sought to requested that the Secret Service provide information regarding discussions between President Clinton and his High School classmate Dolly Kyle Browing at their 1994 high school reunion. Again, this request was not approved by any other member of the Committee, and no advance copy was provided to the Minority. Ultimately, out of 53 procedural and executive session votes taken by the committee 31were on straight or near party line votes.

[319] *Referral from Independent Counsel Kenneth W. Starr*, H.R. Doc. 310, 105th Cong., 2d Sess. 129-210 (1998).

[320] *Investigatory Powers of the Committee on the Judiciary with Respect to its Impeachment Inquiry*, H.R. Rep. No. 795, 105th Cong., 2d Sess. 11-24 (1998).

[321] On July 21, 1998 Rep. Charles Wiggins (R-CA), Don Edwards (D-CA), Walter Flowers (D-Ca), and Robert McClory (R-IL) appeared on the ABC television program "Issues and Answers" and stated that the impeachment inquiry had been conducted fairly. For example, Rep. Wiggins stated "by and large it has been fair .... I have no great quarrel [with the investigation]." 3 Facts on File Watergate and the White House 210 (1974).

official, Committee procedures and attempting to delay the proceedings,[322] but the Majority itself, failed to identify the charges until the last minute.

Throughout the impeachment process, the Majority has resisted requests to narrow, define or state with precision the allegations of misconduct leveled at the President. While the Independent Counsel's Referral specified eleven possible grounds for impeachment, the Majority Counsel, in his initial presentation to the Committee, declined without explanation to even present some of these grounds to the Committee (e.g., Independent Counsel's Grounds 10 and 11 alleging Abuse of Power) . Instead, they rewrote, redefined, or restated the eleven grounds described by the OIC into fifteen somewhat similar, somewhat different allegations of criminal wrongdoing. As an example, the Independent Counsel alleged that the President obstructed justice by encouraging Lewinsky to file a false affidavit in the *Jones* case.[323] In his presentation to the Committee on October 5, however, the Majority Counsel transformed this straightforward allegation into the central underlying factual element of no fewer than *five* charges of criminal wrongdoing.

This tactic, along with the Majority's subsequent abortive forays into allegations relating to Kathleen Willey, Webster Hubbell and campaign finance, engendered considerable confusion about whether the grounds outlined in the Referral would, in fact, continue to be the basis of any proposed articles of impeachment. The articles of impeachment, when finally drafted, returned to the original allegations and appear to confine themselves to the charges relating to the President's relationship with Ms. Lewinsky. Yet, although the OIC's Referral listed specific allegations, even including the actual statements the prosecutors alleged to be false when they were making false statement charged, and although the Majority Staff's original presentation also included specific charges, the actual Articles of Impeachment abandoned such specificity. Rather the Articles make vague charges, such as accusing the President of making false statement about the "nature and details" of his relationship with Ms. Lewinsky.

This lack of specificity reflects poorly on the impartiality of the process and is totally inconsistent with historical precedent. In the last presidential impeachment proceeding, as pointed out by Rep. Alcee Hastings in his December 9, 1998 letter to Chairman Hyde and Ranking Minority Member Conyers, the Judiciary Committee took pains to ensure that each article of impeachment was accompanied by detailed statements of fact:

> Both of you will recall that the Chair and the Ranking Minority member (with the concurrence of the Committee) directed John Doar, Special Counsel for the Majority, and Albert Jenner, Special Counsel for the Minority, to produce a

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[322] Letter from Thomas E. Mooney, Sr., Chief of Staff, House Comm. on the Judiciary, to Charles F.C. Ruff, Counsel to the President (Dec. 6, 1998); Letter from Thomas E. Mooney, Sr., Chief of Staff, House Comm. on the Judiciary, to Charles F.C. Ruff, Counsel to the President (Dec. 3, 1998).

[323] Referral at 173-80 (Ground VI).

> comprehensive Statement of Information in the inquiry into the conduct of President Nixon. The Statement of Information that the staff produced for that inquiry consisted of numbered paragraphs, each of which was followed by photocopies of the particular portions of the evidence that the staff concluded supported the assertions made in that paragraph. President Nixon was invited to and did submit a further Statement of Information in the same format. As a result, an organized, balanced, and neutral statement of the facts and presentation of the supporting evidence was a part of the Committee record that was available for any Member to review.[324]

A similar format was used to support the articles of impeachment voted out against Judge Hastings.[325] No such effort has been made in this case to supply a detailed road map of the supporting evidence for the articles of impeachment.

To Illustrate, in Article I, the charge is misleading testimony concerning "the nature and details of his relationship," but the Article declines to identify which statements are at issue. This lack of specificity would be a grave constitutional defect in any indictment delivered by a grand jury against any criminal defendant. This basic measure of due process, however, has been denied to the President. It is fair to presume that the Majority's unwillingness to specifically identify the charges at issue are rooted in a reluctance to make plain the essential triviality of the allegations of personal misconduct at issue and the salacious nature of the issues that the Senate would be condemned to explore at trial. To have to state that the removal of the President is based on his misstating when his relationship with Ms. Lewinsky started, or how many times he had intimate telephone conversations with her, or where he touched her would demonstrate the frivolity of these charges for something as grave as impeachment.

The Articles also display another unfairness; to the extent that the Articles are occasionally specific, they are unnecessarily duplicative. For example, Majority Counsel has adopted the OIC's allegation that the President tried to influence Ms. Lewinsky to file a false affidavit and lists it in subparagraph 1 of Article III as an obstruction of justice; yet, this same event is included again, renamed as perjury in subparagraph 4 of Article I, as a matter about which the President testified falsely during his grand jury appearance.

V.
CENSURE IS AN APPROPRIATE AND CONSTITUTIONAL ALTERNATIVE TO IMPEACHMENT

Throughout the proceedings, but especially during the debate on the actual Articles of

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[324] Letter from Rep. Hastings to Hon. Henry Hyde, Chairman, Committee on the Judiciary, and Hon. John Conyers, Jr., Ranking Minority Member, Committee on the Judiciary, at 1 (Dec. 9, 1998).

[325] *Id.*

Impeachment, the Majority attempted to blunt the impact of its decision. The Chairman emphasized that "impeachment is not the same as removal." Rep. McCollum even went so far, before he corrected himself, to reassure the public by stating that a conviction of the President in the Senate would not have to lead to his removal from office. Both he and other Republicans called the House vote on impeachment "the ultimate censure."

The Majority Member's statements underscore their discomfort with what they were doing – they too realized that President Clinton should not be removed from office for what, in effect, were his misstatements about a private, extra-marital relationship. Yet, the Majority has put the country on a collision course with the constitution by insisting that impeachment of the President is the only means to address misconduct that is serious but falls below the standard for removal.

There are, unfortunately, partisan reasons behind the Majority's insistence that the House be given an impeachment or nothing option. The Republican leadership understands that there are many Members of both parties who believe that an alternative to impeachment is appropriate. If such an alternative were presented, Republicans would have another means to express themselves on the issue of the President's conduct. This, in turn, would siphon votes away from impeachment -- the resolution the leadership desires. Keeping its Members in partisan line, however, should not be the motivation behind a decision that prevents Members of the House to voting their conscience. A censure resolution would provide lawmakers on both sides of the aisle a constitutional and appropriate alternative.

At the December 12, l998 Hearings, the Representatives Boucher, Delahunt, Barrett, and Jackson Lee introduced a resolution of censure addressing the President's conduct. Almost all of the Democrats on the Committee voted for the resolution and all expressed a desire that their House colleagues have the chance to vote their consciences on this issue. The resolution read

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is the sense of Congress that
>
> (1) on January 20, 1993, William Jefferson Clinton took the oath prescribed by the Constitution of the United States faithfully to execute the office of President; implicit in that oath is the obligation that the President set an example of high moral standards and conduct himself in a manner that fosters respect for the truth; and William Jefferson Clinton has egregiously failed in this obligation, and through his actions violated the trust of the American people, lessened their esteem for the office of President, and dishonored the office which they entrusted to him;
>
> (2)(A) William Jefferson Clinton made false statements concerning his reprehensible conduct with a subordinate;
> (B) William Jefferson Clinton wrongly took steps to delay discovery of the truth;

and
(C) inasmuch as no person is above the law, William Jefferson Clinton remains subject to criminal and civil penalties; and
(3) William Jefferson Clinton, President of the United States, by his conduct has brought upon himself, and fully deserves, the censure and condemnation of the American people and the Congress; and by his signature on this Joint Resolution, acknowledges this censure and condemnation.

Supporters of that resolution maintained that it would be an appropriate way of bringing closure to events that have too long diverted public and governmental attention from more pressing issues. A vote of censure would condemn actions that most members of Congress and the general public find reprehensive but not impeachable. Such a formal censure could then spare the country the wrenching disruption and policy paralysis that would accompany a full trial in the Senate.

Opponents of censure raised both constitutional and policy objections. The constitutional claim was that censure was not mentioned in the Constitution as an alternative to impeachment. In point of fact, numerous actions by Congress are not explicitly mentioned in the Constitution and yet are indisputably permissible under Congress's general authority. Moreover, Congress expresses its sense on a wide range of issues and the President's conduct would be no different. Indeed, just this most recent Congress, the House expressed its disapproval of President Clinton for: purportedly using White House Counsel office resources for personal legal matters;[326] certifying Mexico under the Foreign Assistance Act;[327] and invoking certain evidentiary privileges.[328]

As to the two principal policy objections that Majority members raised, they are inherently inconsistent. Some claimed that a congressional reprimand would be weak and ineffectual. Yet, others claimed that such an action would incapacitating because it would deter the President from making policy decisions that a congressional majority opposed . The first argument is that a censure without penalties would constitute a "toothless resolution," a "copout." [329] The converse argument is that a censure creates a dangerous precedent that would threaten the independence of executive and judicial officials and upset the separation of powers. Frequent actions of condemnation by Congress could divert attention from important legislative initiatives and open the way for retaliation based on politically unpopular decisions.

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[326]H.Res. 397.

[327]H. Res. 58.

[328]H. Res. 432.

[329] Remarks of Representative Bill McCollum, 12/12/98 Tr.; remarks of Representative Elton Galleghy, 12\12\98 Tr.

The Minority pointed out how Republicans were arguing both sides of the argument for their own political purposes. In addition, Democratic Members noted that only one President has ever been officially censured. This form of condemnation scarcely has been the means to abuse the separation of powers. The unique aspects of the current impeachment inquiry also insure that this is not a step that Congress would take lightly. This is obviously not a case in which Congress simply disagrees with Presidential policy, as was true in some of this nation's earlier censure controversies. At issue here is misconduct that the President himself has acknowledged and that a wide margin of the American public and its democratic leaders find offensive. If it take this type of conduct, followed by this degree of consensus among Congress and the public, there would be little to fear that this device would be abused in the future.

The Majority's claim that censure would constitute a meaningless wrist slap is equally unpersuasive. Representative Barney Frank, speaking from his own painful experience, noted in Committee hearings :

> I am struck by those who have argued that censure is somehow an irrelevancy, a triviality, something of no weight. History doesn't say that. There are two members of this House right now who continue to play a role who were reprimanded for lying, myself and outgoing Speaker Gingrich. We both were found to have lied, not under oath, but in official proceedings and were reprimanded. I will tell you that having been reprimanded by this House of Representatives, where I'm so proud to serve, was no triviality, it is something that when people write about me, they still write about . . . for all of us who are in this business of dealing with public opinion, and courting it, and trying to shape it, and trying to make it into an instrument of the implementation of our values, to be dismissive of the fact that the United States House of Representatives or Senate might vote a condemnation as if that doesn't mean anything? Members know better. I cannot think of another context in which members would have argued that a censure, a solemn vote of condemnation, would not have meant very much. Certainly former Senators Thomas Dodd and Joseph McCarthy would not have believed that for a minute.

So too, as Minority members emphasized, a resolution of censure against the President will be "talked about for generations and will live in history." [330]

A. A Censure Resolution Is Constitutional

The authority of Congress to pass resolutions expressing condemnation is well established. Article I, Section 5, (d) (2) of the Constitution authorizes both the House and the Senate the power to punish Members for disorderly behavior. Although the constitutional text provides no similar explicit authority for condemnation of behavior by other individuals,

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[330] Remarks of Representative Boucher, tr. at ????

Congress has long assumed that it has such authority. The House and Senate have considered at least a dozen resolutions condemning conduct by executive or judicial officials.[331] Some of the resolutions use the term "censure," while others use language such as "reproof" or "condemn."[332]

The power to express such disapproval is rooted in traditional legislative authority to register the sense of the House, the sense of the Senate or the sense of Congress.[333] Congressional procedural rules have long authorized the use of single or concurrent resolutions to express legislative opinions on a wide range of matters.[334] All the members of this Committee have voted for such resolutions.

The vast majority of scholars, including over two-thirds of the Majority and Minority witnesses who testified at the Judiciary Committee's hearings, believe that a resolution condemning the President, such as the one proposed during the proceedings, would be constitutional.[335] For example, Harvard Law Professor Laurence Tribe has indicated, that a straight censure resolution would be constitutional "[b]ecause such resolutions entail no exercise of lawmaking authority over the other branches of national government, no exertion of legislative power over the state or local governments, and no assertion of lawmaking authority with respect to the lives, liberties, or property of individuals or groups, they do not bring into play any of the Constitution's substantive or structural limitations on the unauthorized assertion of power by the national legislature."[336] Similarly, the witness called by the Majority and Minority, William and Mary Professor Michael Geahardt concluded that "every conceivable source of constitutional authority – text, structure, and history – supports the legitimacy of the House's passage of a resolution expressing its disapproval of the President's conduct."[337]

Other experts in legislative affairs including the committee on Federal Legislation of the

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[331] Richard S. Beth, *Congressional Research Service*, Censure of Executive and Judicial Branch Officials, Legislation Proceedings, 6 (Oct. 2, 1998) (*hereinafter Beth); Jack H. Maskell, Congressional Research Service, Censure* of the President by Congress, September 29, 1998, 2-4 (hereinafter, Maskell). It is important to note that the Majority repeatedly asked the Committee to turn to proceedings involving federal judges to find precedents for impeachment. Yet, the same Majority apparently now wants the Committee to ignore the fact that Congress has used its censure power to condemn the actions of these same judges when impeachment was too severe.

[332] Censure is commonly defined as a legislative, administration or other body reprimanding a person, normally one of the other members. (Black's Law Dictionary 224 (6th Ed. 1990)).

[333] Beth at 6, Maskell at 2-4.

[334] William Holmes Brown, 134 House Practice; 4 Guide to the Rules, Precedents & Procedures of the House (1996).

[335] Letter of William D. Delahunt to Henry Hyde, Chairman, Committee on the Judiciary, Dec. 4, 1998.

[336] Letter from Laurence H. Tribe to William D. Delahunt, Dec. 1, 1998.

[337] Letter from Michael J. Gearhardt to William D. Delahunt, Dec. 3, 1998.

Association of the Bar of the City of New York, have similarly concluded that Congress has authority to express its condemnation of presidential conduct through means other than impeachment.[338] The Congressional Research Service has also stated that censure would be constitutional: "In the case of ... federal officials [such as the president] censure would be an exercise of the implicit power of a deliberative body to express its views, just as Congress may also express judgments of other persons or events."[339]

Another argument by some of the Majority was that a censure resolution constituted an impermissible "bill of attainder." There is no foundation for such a claim in the text, history, and structure of the Constitution. Article I, Section 9, cl. 2 of the United States Constitution provides that "no Bills of Attainder or ex post facto law shall be passed. " This provision refers to acts by the British Parliament that punished executive officials with death or forfeiture of property. The American prohibition against non-judicial punishment is designed to protect the life, liberty, and property of citizens and the independence of executive and judicial officials. As the Supreme Court has interpreted this prohibition, a bill of attainder involves punishment inflicted by legislative enactment against individuals or readily identifiable groups without judicial trial.[340] Censure resolutions passed by one House have not been viewed as bills of attainder because they do not impose a penalty on the life or property of the person being censured.

The course proposed by the Minority has ample precedent. Resolutions of censure were proposed against Presidents John Adams, John Tyler, James Polk, Abraham Lincoln, and former President James Buchanan, and one was voted against President Andrew Jackson.[341] The censure

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[338] Association of the Bar of New York, *Alternatives to Impeachment: What Congress Can Do.* Tribe Panel. See also authorities cited in Maskell, supra; and David E. Rovella, Hyde Delay, Wrong on Law, National Law Journal, October 5, 1998 at A6 (noting that surveyed constitutional law experts generally agreed that censure was possible).

[339] Beth *supra*. See also Maskell, *supra* ("It has, however, become accepted congressional practice to employ a simple resolution of one House of Congress, or a concurrent resolution by both Houses, for certain nonlegislative matters, such as to express the opinion or the sense of the Congress or of one House of Congress on a public matter, and a resolution of censure as a concurrent or simple resolution would appear to be in the nature of such a 'sense of Congress' or sense of the House or Senate resolution.")

[340] *U.S. v. Brown*, 381 U.S. 437 (1965); *U.S. v. Lovett*, 328 U.S. 303 (1946); *Nixon Administration v. Administration of General Services*, 433 U.S. 425, 468 (1977).

[341] The House of Representatives considered three resolutions condemning John Adams for actions beyond his authority and for interference with the judiciary. All three resolutions were proposed from the floor and none were successful. The presidential conduct at issue arose out of a dispute over extradition. In 1842, the House of Representatives adopted a motion to agree to a select committee report that condemned President Tyler for "gross abuse of constitutional power" for vetoing appropriations bills passed by Congress. Congress twice considered resolutions condemning James Buchanan for conduct allowing political considerations and alleged campaign contribution "kickbacks" to influence government contracts and for his alleged failures to prevent secessions from the Union of several southern states. The proposed censure against President Lincoln responded to his agreement to

of Andrew Jackson occurred in 1834 over his earlier veto of the bill to renew the Charter of the Second Bank of America and his dismissal of Secretary of the Treasury William J. Duane, who had refused to order the removal of federal deposits from the Bank. Interestingly, the censure of President Jackson, which the Majority condemns because it was later reversed, occurred on a strictly partisan vote. It has been considered in history a political event not reflecting on real or deserved rebuke for Presidential misconduct. The Majority's willingness to impeach President Clinton on strictly partisan votes in the Committee more resembles the censure of President Jackson than does the Democratic attempt in 1998 to forge a bi-partisan resolution of this crisis.

B. A Censure Of The President Is Appropriate

There is wide consensus among Americans that the President's conduct should not go without some form of rebuke. There is also wide agreement that impeachment is too severe a penalty. Rather than ignoring the will of the people, Congress should find a way to embody their sentiment. Early on in the process, Representative Graham said: "Without public outrage, impeachment is a very difficult thing, and I think it is an essential component of impeachment. I think that is something that the founding fathers probably envisioned."[342] Mr. Graham was correct when he made that statement and the goal of the Committee should have been to find an alternative that reflected the public will. The view that censure is the appropriate remedy is shared by Republicans as well as Democrats. For example former President Gerald Ford, former Republican Presidential candidate Robert Dole, and former Massachusetts Governor William Weld all support some form of censure or rebuke as the appropriate action by the House.[343]

The consensus of concern about the President's conduct is reflected in the resolution proposed by the Minority. It points out the role of a President to set "an example of high moral standards and conduct himself in a manner that fosters respect for the truth." It also underscores how President Clinton "failed in this obligation, and through his actions violated the trust of the American people, lessened their esteem for the office of President, and dishonored the office which they entrusted to him." Far from being a "slap on the wrist" or mild rebuke, as some Majority Members have stated, this resolution would stain President Clinton's place in history as painfully as any Congressional action, short of removal from office, could possibly do.

Members of the Committee also agreed that censure was the proper response to the

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allow Francis P. Blair, Jr. to hold commissions in the Army while also serving as an elected member of the House of Representatives. There were also censure alternatives proposed concerning President Nixon's conduct with respect to the Watergate break-in and cover-up. Once clear and convincing evidence surfaced from the tape-recorded conversations of the President's involvement with abuse of government agencies, this resolution gave way to impeachment.

[342] 11/19/98 Tr. At 325.

[343] President Gerald R. Ford, *The Path Back to Dignity*, New York Times, Oct. 4, 1998, at D15; Robert Dole, *A Tough but Responsible Solution*, New York Times, Dec. 15, 1998, at A31.

President's misconduct. Rep. Boucher, a sponsor of the censure alternative, argued to the Committee that the "Framers of the Constitution intended that the impeachment power be used only when the Nation is seriously threatened[,]" *i.e.*, "it is only to be used for the removal from office of a Chief Executive whose conduct is seriously incompatible with either the constitutional form and principles of our government or the proper performance of the constitutional duties of the Presidential office."[344] As Rep. Boucher noted, the "facts that are now before this committee which arise from a personal relationship and the effort to conceal it simply do not rise to that high constitutional standard."[345]

Rep. Boucher also argued that censure is "preferable to impeachment for yet another reason. " . . . The President and Congress will be diverted from the Nation's urgent national agenda while a prolonged trial takes place in the Senate. The Supreme Court will be immobilized all during that time as the Chief Justice presides during the Senate trial."[346] Rep. Boucher concluded that those "harms are not necessary" because "the Senate will not convict."[347] He urged the Members to "reach this sensible conclusion, which more than any other approach will simultaneously acknowledge our long constitutional history and place this Nation, the Congress and the Presidency on a path toward the restoration of dignity."[348]

Similarly, Rep. Delahunt, another sponsor of the resolution, argued that impeachment "is not a punishment to be imposed on Presidents who fall short of our expectations. It is a last resort, an ultimate sanction to be used only when a President's actions pose a threat to the Republic so great as to compel his removal before his term has ended, not as a form of censure."[349] Rep. Delahunt noted that the Democratic resolution "does not mince words. It denounces the President's behavior sternly and unambiguously in plain, simple English[,] [and] i[t] acknowledges that the President is not above the law."[350]

In making a request that the Majority permit a vote on censure on the House floor, Mr. Barrett observed that "this country will not accept a sanction that is not a bipartisan sanction, it will continue to divide this country. And I say to the proponents of Impeachment, if you want the Impeachment to be accepted, there has to be a showing of good faith, a showing that every single

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[344] 12/12/98 Tr. at 169.

[345] 12/12/98 Tr. at 169.

[346] 12/12/98 Tr. at 171.

[347] 12/12/98 Tr. at 171.

[348] 12/12/98 Tr. at 171.

[349] 12/12/98 Tr. at 180.

[350] 12/12/98 Tr. at 181. Even Mr. Smith, a Member of the Majority, acknowledged that the Democratic alternative was a "serious and strong resolution." 12/12/98 Tr. at 203.

Member of this Congress was given the opportunity to vote his or her conscience."[351]

Finally, Rep. Jackson Lee, another sponsor of the censure resolution, noted that the American people have "now challenged us to break this impasse. They have now risen to the point of saying: Censure this President, rebuke him for his wrong and horrible and intimidating conduct. He has hurt his wife, his daughter, his family of Americans. Listen to us. Let us be heard.[352] Rep. Jackson Lee argued that "[c]ensure is right for this Nation. It causes us to rise above the political divide, and it is not unconstitutional. Th[ere] is no prohibition in the Constitution, and it is right for us to send this motion to the floor of the House."[353] Rep. Jackson Lee urged that a vote for censure is a "[v]ote to heal this Nation[.]"[354]

A pillar of the American justice system is that the punishment must fit the offense. The constitutional scholars from whom the Committee heard all agreed that impeachment should serve to protect the nation, not punish the offender. For Congress to alter that process and impose the ultimate political sanction of removal from office is without historic precedent. If the Majority is to be taken at its word that it wants to demonstrate that the President is not above the law, then a censure resolution, which would serve as punishment, is the proper means.

CONCLUSION

After considering thousands of pages of constitutional history, evidentiary findings, and testimony of witnesses, this Committee should now be in a position to recognize not only what impeachment is, but also what it is not. Impeachment is not a means to express punitive judgements; it is not a vehicle for policing civil litigation or grand jury proceedings; and it is not a means for censuring immoral conduct. Other criminal and judicial sanctions are available for that purpose. Impeachment serves to protect the nation, not punish offenders. As the preceding dissenting views makes clear, removing the President on the basis of the record before us ill serves that national interest.

Both Majority and Minority Members agree that removal from office is appropriate only for conduct that falls within the Constitutional standards of "Treason, Bribery, or Other High Crimes and Misdemeanors." By that standard, the evidence before the Committee falls far short. Some four hundred of the nation's leading historians, and a like number of constitutional law scholars took the trouble to write to the Committee expressing their view that the President's misconduct, even if proven, would not satisfy constitutional requirements for removal from

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[351] 12/12/98, Tr. at 318.

[352] 12/12/98 Tr. at 198.

[353] 12/12/98 Tr. at 199.

[354] 12/12/98 Tr. at 199.

office. As Harvard Law Professor Lawrence Tribe's statement at the November 9 hearings made clear, "weakening the presidency through watering down the basic meaning of "high Crimes and Misdemeanors seems a singularly ill conceived .. .way of backing into a new-- and for us untested-- form of government."[355]

Majority members of the Committee repeatedly insisted that their role in impeachment proceedings was to protect "the Rule of Law." If so, the appropriate means would be adherence to constitutional standards and basic requirements of procedural fairness and due process. The Committee's own inquiry, and the Independent Counsel's Referral, all far short of those requirements.

As Minority Members of the Committee recognized, the President is not above the law. But neither is he beneath its protections. He is entitled to fair notice of the charges and an unbiased investigation as to their support. The Independent Counsel's Referral and the resulting Articles of Impeachment provide neither. The ethical violations by OIC prosecutors and their failure to provide the Committee with exculpatory materials calls into question the quality and credibility of the information they provided. Since the Committee itself called no fact witnesses and conducted no independent investigation, its record fails to supply the clear and convincing evidence necessary to support impeachment.

In the long run, history will judge not only the conduct of the President but the conduct of this Committee. Because its proceedings fail to conform to fundamental constitutional standards, Minority Members respectfully dissent.

[355] *Subcommittee Hearing*, *supra* (written testimony of Laurence Tribe).